IN THE

Supreme Court of the United States

October Term, 1972

No. ...

OCCIDENTAL PETROLEUM CORPORATION, a California corporation, and OCCIDENTAL OF UMM AL QAYWAYN, INC., a California corporation,

Petitioners,

vs.

BUTTES GAS & OIL COMPANY, a corporation, JOHN BORETA and WILLIAM H. SMITH,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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BUTTES GAS & OIL COMPANY, a corporation, JOHN BORETA and WILLIAM H. SMITH,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming dismissal of the complaint herein.

Opinions Below.

The opinion of the District Court appears at 331 F. Supp. 92 (C.D. Calif. 1971). Only the slip opinion of the Court of Appeals has yet been published. The opinions of both courts are reproduced in the appendix.

Jurisdiction.

The judgment of the Court of Appeals was filed and entered June 23, 1972. On July 11, 1972, the Court

of Appeals filed an Order Staying Issuance of Mandate, pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure, pending the filing, consideration and disposition by this Court of a petition for a writ of certiorari, provided such petition is filed on or before August 14, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Question Presented for Review.

Whether the act of state doctrine bars an antitrust action by an American company against other American companies and their officers, all private American citizens, for a conspiracy, formed and furthered in the United States, to preclude competition in foreign and interstate commerce of the United States merely because conduct in furtherance of the conspiracy induced acts by foreign governmental officials which violated international law.

Statutes Involved.

The statutes involved are various sections of the antitrust laws and the Hickenlooper Amendment to the Foreign Assistance Act of 1964. They are 15 U.S.C. §§ 1, 2, 4 and 15 and 22 U.S.C. § 2370(e)(2). Because of their length, they are printed in the Appendix.

Statement of the Case.

Occidental Petroleum Corporation and a wholly owned subsidiary ("Occidental" collectively) filed an antitrust action in June 1970 against Buttes Gas & Oil Company ("Buttes"), Clayco Petroleum Corporation ("Clayco") and certain officers of Buttes and Clayco. All plaintiffs and defendants are either American corporations or individual American citizens. The complaint alleged conspiracy in restraint of trade in, con-

spiracy to monopolize, and attempted monopolization of, the exploration and exploitation of petroleum reserves underlying the territorial waters of the Trucial States, sheikdoms located on and near the Persian Gulf.

The District Court had jurisdiction under 15 U.S.C. § 15 and 28 U.S.C. § 1331(a).

Clayco and its president moved successfully to dismiss for lack of personal jurisdiction, improper venue and defective service of process. Occidental did not press an appeal from that ruling. Buttes and its officers moved successfully for dismissal on substantive grounds, Occidental appealed and the Court of Appeals for the Ninth Circuit affirmed. Occidental petitions for a writ of certiorari regarding the dismissal as to Buttes and its officers.

Buttes urged five grounds for dismissal. The District Court rejected all but one—the act of state doctrine. The Court of Appeals affirmed solely on the ground of the act of state doctrine without reaching the other grounds.*

The facts alleged in the complaint must be deemed true on a motion to dismiss. *Kossick v. United Fruit Co.*, 365 U.S. 731, 732 (1961). They are as follows.

Occidental actively explores for and extracts oil in North Africa and the Middle East. Substantial quantities of oil produced there by Occidental are imported into the United States. In October 1969, Occidental was a competing bidder with Buttes and Clayco for a concession to extract and sell oil from the seabed under-

*The four grounds rejected by the District Court and not considered by the Court of Appeals are fully, and, in Occidental's view, correctly discussed and disposed of in the opinion of the District Court, reprinted in the Appendix.

lying the territorial and offshore waters of the sheikdom of Umm Al Qaywayn (pronounced "Oom Ahl Kwain"). Occidental was successful, obtaining a concession in November 1969.

The concession area extended from the coast of Umm Al Qaywayn on the Persian Gulf to a line three nautical miles from the shores of Abu Musa, an island in the Gulf claimed by Umm Al Qaywayn's neighboring sheikdom, Sharjah. The area was shown on a map incorporated in the concession agreement and annexed to the complaint. Occidental, Buttes and Clayco had bid for the concession knowing that its area was as depicted on this map.

In late December 1969, Buttes and Clayco, having lost out in Umm Al Qaywayn, obtained a concession from Sharjah. This concession covered the seabed underlying the territorial waters of Sharjah only. The Buttes/Clayco concession agreement with Sharjah in fact contained the same map as Occidental's agreement with Umm Al Qaywayn, recognizing that Occidental's concession extended to three miles from the coastline of the island of Abu Musa.

In early 1970, Occidental completed seismic tests within its concession. These tests indicated an extensive potentially oil and gas bearing geological structure underlying the offshore waters of Umm Al Qaywayn about nine miles seaward from Abu Musa and completely within Occidental's concession area.

Upon learning of this geological structure, Buttes and Clayco entered into an agreement, understanding and concert of action in the United States to eliminate Occidental as a competitor by preventing Occidental from exploiting its concession. In furtherance of the

agreement, they submitted plans, drawn in the United States, for drilling at the location of Occidental's discovery, to the British Political Agent in the Trucial States for approval. (By treaty, the United Kingdom conducted the foreign affairs of the sheikdoms, in effect, as protectorates.) The plans were rejected because the proposed drilling area was clearly within Occidental's exclusive concession. Indeed, the British Foreign Office had originally supplied the map depicting the area of Occidental's concession and had certified the boundaries as accurate.

Buttes and Clayco then induced the Ruler of Sharjah, for his own personal gain, to protest. They caused a decree to be prepared purporting to declare for Sharjah a 12-mile territorial limit surrounding the island of Abu Musa. The decree first appeared in March or April 1970, long after the respective concessions recognizing a 3-mile limit had been granted and Occidental had located the geological structure within its concession area. The decree, however, was fraudulently backdated to September 10, 1969. The British Political Agent, recognizing the binding nature of the concession agreements, rejected the backdated decree.

Buttes and Clayco next arranged to have one of their attorneys appointed legal advisor to the Ruler of Sharjah. They instructed their attorney to procure from the Ruler decrees purporting to restrain Occidental from exploiting its discovery. Buttes and Clayco then had prepared a purported amendment of their concession agreement with Sharjah, attempting to extend their drilling rights to within 12, rather than three, miles of Abu Musa. Buttes and Clayco next obtained a "supplementary decree", purporting to claim for Sharjah the concession area previously granted to Occidental.

The British Foreign Office asked the Ruler of Sharjah to stop issuing such decrees, refused to recognize the attempted amendment of the Buttes/Clayco concession agreement and stated that Occidental's drilling operations could proceed.

Buttes and Clayco next sent their representative to an oil company in Teheran, Iran, and induced that company to issue a letter stating that Iran claimed Abu Musa. Buttes and Clayco then persuaded the British Foreign Office to reverse its previous opinion. When Occidental tried to start drilling, it was forcibly restrained by British naval units. Under threat of exile, the Ruler of Umm Al Qaywayn directed Occidental not to drill. Having spent over $3 million, Occidental was forced to suspend its operations.

ARGUMENT.

The District Court's dismissal of the complaint was based solely on the act of state doctrine, as was the Court of Appeals' affirmance.* The essence of the doctrine is that the courts of one government will not adjudicate the validity of acts of another done within its own territory. *Underhill v. Hernandez*, 168 U.S. 250 (1897). As a matter of law, the doctrine is inapplicable on several separate and independent bases. Equally important as a matter of policy, the view of the doctrine adopted by the courts below, if permitted to stand, will encourage and protect anticompetitive behavior having its origin and impact in the United States under the guise of internationality at a time when firms operating both here and abroad are proliferating and when their influence abroad rivals or exceeds that of some small governments.

I.

The Act of State Doctrine Does Not Immunize From the Antitrust Laws Anticompetitive Conduct of American Citizens Which May Have Induced and Been Aided by Foreign Governmental Action, but Which Has Occurred at Least in Part in This Country and Has Affected This Country's Commerce.

The complaint does not seek damages for acts of a foreign state. It seeks redress for the conduct of private parties, all of them American, which intentionally eliminated Occidental from competition in a commodity which, though originating abroad, flows in United

*Petitioners agree with the rejection by the District Court of four other grounds urged by Buttes and adopt the opinion of the District Court, which is reprinted in the Appendix, to that extent.

States foreign and interstate commerce. That private American citizens may, incident to the furtherance of their anticompetitive scheme, have induced foreign governmental acts does not insulate those citizens from the Sherman Act.

Occidental's complaint charges the defendants with wrongfully scheming against Occidental. The scheme is alleged to have been hatched in the United States, to have been effectuated through plans and documents conceived and prepared in the United States, and to have had a substantial adverse effect on competition in United States interstate and foreign commerce.

In *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927), this Court ruled that defendants who procure foreign governmental aid to commit acts outside the United States which restrain United States commerce are subject to our antitrust laws. Under Occidental's complaint, as in *Sisal,* there is clearly a "contract, combination, and conspiracy entered into by parties within the United States and made effective by acts done therein" (274 U.S. at 276).

The District Court relied upon a pre-*Sisal* decision, *American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909), in dismissing Occidental's complaint. (See 331 F.Supp. at 109-10; Appendix, pp. 30-33.) The complaint in *American Banana* alleged that the defendant had induced Costa Rican soldiers to seize plaintiff's property in order to destroy plaintiff's fledgling banana business. This Court affirmed dismissal of the complaint on the ground that "what the defendant did in Panama or Costa Rica is not within the scope of the [Sherman Act] so far as the present suit is concerned." (213 U.S. at 357.)

American Banana's restrictive view of the Sherman Act's territorial reach has since been rejected by this Court. Moreover, the complaint in *American Banana* alleged no impact upon American commerce and no acts done in the United States. Occidental's complaint alleges both. In *Sisal,* the Court distinguished *American Banana* on these very points:

> "The circumstances of the present controversy are radically different from those presented in *American Banana Co. v. United Fruit Co., supra,* and the doctrine there approved is not controlling here. . . .
>
> "Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. . . . The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, *not* merely of something done by another government at the instigation of private parties. *True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States.* They are within the jurisdiction of our courts and may be punished for offenses against our laws." (274 U.S. at 275-6.) (Emphasis added.)

More recently, in *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), a treble damage suit, the defendant had its subsidiary appointed the Canadian government's exclusive wartime agent to purchase and allocate vanadium for Canadian industries. The subsidiary engaged in discriminatory pur-

chasing, enabling the defendant to monopolize the vanadium industry. The Court said:

> ". . . What the petitioners here contend is that the respondents are liable for actions which they themselves jointly took, as part of their unlawful conspiracy, to influence or to direct the elimination of Continental from the Canadian market. As in *Sisal,* the conspiracy was laid in the United States, was effectuated both here and abroad, *and respondents are not insulated by the fact that their conspiracy involved some acts by the agent of a foreign government.*" (370 U.S. at 706.) (Emphasis added.)

The courts below failed to measure how far antitrust doctrine has grown beyond the limited reach permitted in 1909 by *American Banana.* In doing so they not only failed to heed *Sisal* and *Continental Ore,* but ignored the judicial awareness, reflected by these later cases, that business refuses to follow neat political boundaries and the teaching that American firms do not escape the discipline of our antitrust laws by the coloration of international operation.

II.

Congress Has Made the Act of State Doctrine Inapplicable to This Case.

The act of state doctrine, as it exists in American jurisprudence, first saw light in *Underhill v. Hernandez,* 168 U.S. 250, 252 (1897). The Court stated that "the courts of one country will not sit in judgment on the acts of another done within its own territory." The rationale subsequently articulated was that the doctrine avoided thwarting American foreign policy by embarrassing the Executive Branch. *United States*

v. Pink, 315 U.S. 203, 232 (1942). The doctrine was not "compelled either by the inherent nature of sovereign authority . . . or by some principle of international law", nor was it constitutionally required. *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421, 423 (1964).

In 1964, in *Banco Nacional de Cuba v. Sabbatino, supra,* the Court extended the doctrine even to violations of international law. Congress quickly passed the Hickenlooper Amendment to the Foreign Assistance Act of 1964. The pertinent provisions are:

> ". . . no court in the United States shall decline on the ground of the federal act of state doctrine *to make a determination on the merits* giving effect to the principles of international law in a case in which *a claim of title or other right to property* is asserted by any party . . . based upon (or traced through) *a confiscation or other taking* after January 1, 1959, by an act of that state *in violation of the principles of international law, including the principles of compensation . . .: Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court." (22 U.S.C. § 2370[e][2].) (Emphasis added.)

The amendment was intended to modify *Sabbatino's* extension of the doctrine and to reverse the presumption

that adjudication of the act of a foreign state would embarrass the conduct of foreign policy:

> "The effect of the amendment is to achieve a reversal of presumption. . . . Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy." (S.Rep.No. 1188, 88th Cong., 2d Sess. 24 [1964].)

Accord: *Banco Nacional de Cuba v. Farr,* 243 F.Supp. 957, 977 (S.D.N.Y. 1965), *affirmed,* 383 F.2d 166 (2d Cir. 1967), *cert. denied,* 390 U.S. 956 (1968).

The Hickenlooper Amendment thus requires, first an inquiry into the lawfulness, under international law, of the conduct pleaded in the complaint. If a violation of international law has been pleaded, the act of state doctrine is inapplicable, unless the Executive notifies the court that foreign policy interests are overriding. There has been no such notification by the Executive in this case.

A. The Taking of Occidental's Concession Rights Without Compensation Clearly Violated International Law.

Failure to compensate for a taking is a violation of international law for purposes of the Hickenlooper Amendment. The amendment condemns a taking in violation of the principles of international law "including the principles of compensation". Section 1 of the Foreign Assistance Act, which the amendment supplements, refers to "obligations under international law

. . . including speedy compensation for such property" (22 U.S.C. § 2370[1]). See *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 183-5 (2d Cir. 1967), *cert. denied*, 390 U.S. 956 (1968).

Anglo-Iranian Oil Co. v. Jaffrate (The Rose Mary), 1 Weekly L.R. 246, 1953 Int.L.Rep. 316 (Supreme Court of Aden, 1953) is particularly instructive. Iran had granted an oil concession to the plaintiff, a British corporation. Iran later abrogated the concession without compensation and nationalized its oil fields. The defendant, an Italian company, purchased oil from Iran for shipment to Italy. While the oil was enroute by sea to Italy, a British warplane forced the ship into the British protectorate of Aden, where the plaintiff sued to recover the oil. The defendant claimed that the act of state doctrine barred the suit. The court disagreed and ruled that by failing to provide prompt, adequate and effective compensation to the plaintiff Iran had acted "contrary to international law" and "the forum would consider any title derived from the law to be invalid." Goldie, "The *Sabbatino Case:* International Law versus The Act of State", 12 U.C.L.A. L.Rev. 107, 120 (1964).

By precise analogy, Occidental had an oil concession from Umm Al Qaywayn which Buttes and Clayco caused to be abrogated without compensation to Occidental. Buttes and Clayco now claim the oil in violation of Occidental's rights. Had *The Rose Mary* come before an American court after the Hickenlooper Amendment, the outcome would have been identical.

B. The Hickenlooper Amendment Applies Whether the Taking Was of Oil or of a Contractual Right to Oil.

A dictum in a 4-3 New York state court decision states that a contractual right is not a "right to property" within the Hickenlooper Amendment. *French v. Banco Nacional de Cuba,* 23 N.Y.2d 46, 242 N.E.2d 704 (1968). The proposition is clearly erroneous. As Judge Keating noted in dissent in *French,* "Why the word 'property' in the Hickenlooper Amendment should not include contractual rights remains a complete mystery." (242 N.E.2d at 724.)

The Restatement of the Foreign Relations Law of the United States, § 191, states that "property includes tangible . . . and intangible property." Comment a to § 191 states that "the rules regarding the taking of property are applicable by analogy to the taking of contract rights."

Occidental's find was taken and turned over to Buttes and Clayco. This interference with Occidental's contractual rights is clearly a taking of property in breach of international law:

> "When a state interferes . . . with its existing contractual obligations . . . by resort to its law-making powers . . . [t]he rights under the contract should be regarded as property and the case as one of confiscation of property. . . . Breach of contract by legislative act will *ipso facto* be a breach of international law. . . ." Amerasinghe, "State Breaches of Contracts with Aliens and International Law", 58 Am. J. of Int'l. Law 881 (1964).

The analogy of contract rights to property rights was implicit in *The Rose Mary* decision, *supra.* The court relied upon two English cases, both refusing to recognize the sovereign's inducing a breach of contract as a legitimate act of state. One of them, *Wolff v. Oxholm,* 6 M & S 92, 105 Eng. Rep. 1177 (K.B. 1807), also teaches that "foreign political acts transferring property contrary to international law are not entitled to recognition in the forum, and may be 'treated as a nullity.' " Goldie, "The *Sabbatino Case:* International Law Versus Act of State", 12 U.C.L.A. L. Rev. 107, 120 (1964).

C. Occidental's Complaint Alleged a Violation of International Law Sufficient to Invoke the Hickenlooper Amendment; Even if It Did Not, Occidental Should Have Been Granted Leave to Amend for That Purpose.

The District Court stated that the complaint omitted to allege that acts of the Ruler of Sharjah, other than his decrees and the amendment of the Buttes/Clayco concession agreement, and the acts of Iran, Umm Al Qaywayn and Great Britain violated international law. Second, the Court noted that the complaint referred to an "attempted" confiscation, whereas the Hickenlooper Amendment applies only to a "confiscation or other taking" and not to an "attempted" confiscation. (331 F.Supp. at 112; Appendix, p. 38.)

The essence of the complaint, even strictly read, is that Occidental's property rights under its concession were confiscated without compensation as a direct consequence of conduct of the Ruler of Sharjah which was specifically alleged to have violated international

law. Occidental, moreover, was entitled to have all inferences drawn in its favor on a motion to dismiss. *Gruen Watch Co. v. Artists Alliance,* 191 F.2d 700, 705 (9th Cir. 1951). The complaint should have been read as alleging that all purported governmental acts culminated in a violation of international law. As for supposed acts of Iran, the complaint alleged only a private commercial communication by an Iranian oil company, at Buttes' and Clayco's urging, that Iran claimed Abu Musa. This conduct was not alleged as an act of the government of Iran. It is true that British armed forces interfered with Occidental's drilling. However, this use of force is not what the complaint seeks to remedy and is relevant only to demonstrate how effectively Buttes and Clayco executed their plan to eliminate competition. In any event, the ultimate effect—the ousting of Occidental from its concession—was an internationally unlawful confiscation without compensation. The acts of force and fraud by which that result was achieved were likewise internationally unlawful steps toward the unlawful end.

That an "attempted" confiscation is not within the Hickenlooper Amendment is at best only a semantic point. The complaint alleged an "attempted" confiscation only because the injunctive relief sought might have restored Occidental's freedom to exploit its concession. If, for pleading purposes, the Hickenlooper Amendment requires the allegation of a completed confiscation, Occidental should have been given leave to allege so by amendment.

D. The District Court Erred in Applying American Banana Instead of the Hickenlooper Amendment.

Despite the wholesale distinction of *American Banana* in *Sisal* and *Continental Ore*, the District Court reasoned that "the holding of *American Banana* that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant." This proposition, the Court wrote, was "clearly establish[ed]" by two cited authorities. (331 F.Supp. at 110; Appendix, pp. 32-33.)

For purposes of this case, the Hickenlooper Amendment disposes of any act of state language in *American Banana* and the two authorities relied upon by the District Court actually support Occidental.

The District Court read *American Banana* as an act of state case because it cited *Underhill v. Hernandez*, 168 U.S. 250 (1897), which originally adopted the doctrine:

> ". . . The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But *a seizure by a state is not a thing that can be complained of elsewhere in the courts. Underhill v. Hernandez*, 168 U.S. 250. . . ." (213 U.S. at 357.) (Emphasis added.)

It is precisely such a seizure, when made in violation of international law, which the Hickenlooper Amendment puts beyond the act of state doctrine, absent an

expression of Executive desire to the contrary. Therefore, even if *American Banana* retained vitality, it would not apply.

One of the two other authorities relied on by the District Court was Fugate, "Antitrust Jurisdiction and Foreign Sovereignty", 49 Va.L.Rev. 925 (1963). The writer, in an article written before passage of the Hickenlooper Amendment, noted that our courts show "great care in foreign trade antitrust cases not to encroach upon the sovereignty of other nations; *American Banana* is uniformly cited as authority on this point." He concluded, however,

> ". . . The 'foreign sovereignty' *exception* to the application of the antitrust laws enunciated in the *American Banana* case *is strictly limited* to activities in another country *actually required* by the laws of that country." (49 Va.L.Rev. at 934.) (Emphasis added.)

The District Court plainly gave more weight to the "strictly limited" *American Banana* "exception" than it deserves. The conduct of Buttes and Clayco recited in the complaint cannot possibly be construed as *required* by any law of any country.

The second other authority relied on by the District Court, *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), teaches that a District Court has Lanham Act jurisdiction to award relief to an American corporation against trademark infringement and unfair competition consummated in a foreign country by a United States citizen who purchases parts here and some of whose

products, sold abroad, enter this country, where they may reflect adversely upon the American corporation's reputation. Distinguishing *American Banana,* the Court said:

> "*American Banana Co. v. United Fruit Co.,* 213 U.S. 347 (1909), compels nothing to the contrary. . . . Viewed in its context, the holding in that case was not meant to confer blanket immunity on trade practices which radiate unlawful consequences here, merely because they were initiated or consummated outside the territorial limits of the United States. Unlawful effects in this country, absent in the posture of the *Banana* case before us, are often decisive; this Court held as much in *Thomsen v. Cayser,* 243 U.S. 66 (1917), and *United States v. Sisal Sales Corp.,* 274 U.S. 268 (1927)." (344 U.S. at 288.)

The facts Occidental pleaded are within this teaching. The complaint alleges acts by American citizens within the United States resulting in direct, adverse effects upon American foreign and interstate commerce.

III.

The Acts of the Ruler of Sharjah Were Not Sovereign Acts.

An obvious prerequisite for invoking the act of state doctrine is that the acts complained of be sovereign acts. *Oetjen v. Central Leather Co.,* 246 U.S. 297 (1918). The acts of the Ruler of Sharjah, induced and even stage-managed by Buttes and Clayco, were not those of a sovereign.

The sheikdoms had delegated to the United Kingdom exclusive authority to pass on their international relations. Thus, the concession agreements had to be approved by the British Foreign Office. Thus, too, the Ruler of Sharjah did not attempt to issue his "decrees" and "amendments" as final and determinative acts, but submitted them to the British Foreign Office.

Hence, the "acts" of the Ruler of Sharjah were not the acts of a sovereign state. A government must have the power to engage in foreign relations in order to qualify as a state within the meaning of the doctrine. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 293 F. Supp. 892, 910 (S.D.N.Y. 1968).

The complaint alleges that the Ruler of Sharjah acted "for his own personal gain and benefit". Even if the Ruler were a sovereign, such motives make the act of state doctrine inapplicable. *Jimenez v. Aristeguieta,* 311 F.2d 547 (5th Cir. 1962).

The District Court distinguished *Jimenez* as holding only that crimes committed by a chief of state outside or in violation of his official authority are not acts of state.* *Jimenez,* however, goes farther:

> ". . . It is only when officials having sovereign authority act in an official capacity that the Act of State Doctrine applies. [Citations omitted.]
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> ". . . .
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> ". . . .

*The District Court also read the complaint as alleging that only *some* acts of the Ruler of Sharjah were motivated by personal gain and that the Ruler acted at *all* times in his

> "Underhill v. Hernandez does not support appellant's claim of sovereign immunity. . . . The Supreme Court held that Hernandez as a military commander representing a *de facto* government in the prosecution of a war, was not civilly responsible for those acts; pointed out that Hernandez *was not 'actuated by malice or any personal or private motives;' and made it clear that its decision would have been otherwise had defendant's action been differently motivated, as is the case here. Judge Whitehurst expressly found that the acts of appellant establishing probable cause of guilt of the financial crimes were 'for the private financial benefit of the defendant'.*" (311 F.2d at 557-8.) (Emphasis added.)

It is readily apparent that Occidental's complaint was tailored to this language.

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official capacity and on behalf of the state. (331 F.Supp. at 113; Appendix, p. 40.) Even if the complaint might have been susceptible to such a reading in another context, the District Court was bound to read it in the light most favorable to Occidental. *Gruen Watch Co. v. Artists Alliance*, 191 F.2d 700, 705 (9th Cir. 1951). At the very least, leave to amend should have been granted to cure any uncertainty that the Ruler was not alleged to have acted as a sovereign.

IV.

Conclusion.

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

Opinions Below.

Occidental Petroleum Corporation, a California corporation, and Occidental of Umm al Qaywayn, Inc., a California corporation, Plaintiffs, v. Buttes Gas & Oil Company, a corporation, Clayco Petroleum Corporation, a corporation, John Boreta, William H. Smith, E. David Philley, and Bruce J. Clayman, Defendants. Civ. No. 70-1397-HP.

United States District Court, C. D. California.

March 17, 1971.

OPINION AND ORDER

PREGERSON, District Judge.

This is a private antitrust suit for treble damages and an injunction,[1] brought by Occidental Petroleum Corporation and its wholly owned subsidiary Occidental of Umm al Qaywayn against the Clayco Petroleum Corporation ("Clayco") and its president, Clayman, and the Buttes Gas and Oil Company ("Buttes") and its officers Boreta and Smith.[2] The complaint charges the defendants with conspiracy in restraint of trade,[3] conspiracy to monopolize,[4] and attempted monopoly,[5] all with respect to "the ex-

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[1]Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26.

[2]A third employee of Buttes, Philley, was originally named as a defendant, but he has been dropped from the action by stipulation of the parties. The Buttes Company, Boreta, and Smith will occasionally be referred to collectively as "the Buttes defendants."

[3]Sherman Act § 1, 15 U.S.C. § 1.

[4]Sherman Act § 2, 15 U.S.C. § 2.

[5]*Id.*

ploration, development and exploitation of petroleum reserves of the territorial waters of the Trucial States." The plaintiffs and the defendant corporations are holders of offshore oil concessions granted by two adjacent sheikdoms in the Persian Gulf. Defendants are charged with instigating a presently pending international dispute over sovereign rights to a portion of the Gulf—allegedly covering the richest area of plaintiffs' concession—with the result that plaintiffs have been prevented from enjoying the fruits of their concession.[6] The facts alleged in the complaint also constitute the basis of a claim for damages and injunctive relief, on the theory of inducing breach of contract, instituted in California state court between the present parties.

The court has before it separate motions to dismiss, urged respectively by Clayco and Clayman on the one hand and by the Buttes defendants on the other. Clayco and Clayman claim lack of personal jurisdiction, improper venue, and defective service of process. The Buttes defendants attack the face of the complaint, raising five substantive grounds allegedly warranting dismissal of the action. The two sets of motions will be considered separately.

THE CLAYCO-CLAYMAN MOTION

Personal jurisdiction of defendant Clayman and venue as to him are governed by Section 4 of the Clayton Act, 15 U.S.C. § 15, which permits suit against a non-corporate defendant "in the district in which the defendant resides or is found or has an agent * * *."

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[6] A complete statement of the facts pleaded in the complaint is reserved to the portion of this opinion dealing with the Buttes defendants' motion.

By affidavit and motion, Clayman affirms that he is a resident of New York and has never resided in the Central District of California. From the face of this averment it would appear that this court does not have jurisdiction over the person of Clayman, and that venue as to him is not properly laid here.

Plaintiffs have at no time in this proceeding disputed Clayman's affirmations. They urge only that decision of whether he is properly before this court be reserved until they may, by discovery process, ascertain whether there in fact exist any bases of jurisdiction as to him. Plaintiffs have cited no authority for the proposition that the court may continue the pendency of an action against an individual defendant, and allow him to be subjected to discovery in that capacity, where the court has before it an unrebutted showing that he is not within its personal jurisdiction. In these circumstances, this court considers it necessary to dismiss the complaint as to Clayman for want of jurisdiction over his person. *See* Hansen Packing Co. v. Armour & Co., 16 F.Supp. 784, 786-787 (S.D.N.Y. 1936). Similarly, dismissal on the ground of improper venue would appear warranted. 15 U.S.C. § 15.

Defendant Clayco urges dismissal on the grounds of lack of personal jurisdiction, improper venue, and insufficiency of service of process. These matters are governed by Section 12 of the Clayton Act, 15 U.S.C. § 22, which provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The uncontested allegations before the court are that Clayco is a Delaware corporation, that its principal and only place of business is in New York, that it has never conducted business in this district, and that it has no officers, agents, offices, property, or other links in California or in this district. Once again, then, there appears a prima facie showing under the relevant statute that jurisdiction and venue are not here properly laid.

To overcome this showing, plaintiffs rely upon the so-called "co-conspirator" or *"Giusti"* theory of antitrust venue—a doctrine which had its origin in the case of Giusti v. Pyrotechnic Industries, 156 F.2d 351 (9th Cir.), cert. den., Triumph Explosives v. Giusti, 329 U.S. 787, 67 S.Ct. 355, 91 L.Ed. 675 (1946). Plaintiffs' reading of *Giusti* and the cases following it is that, by virtue of an agency principle, "co-conspirators are deemed to be found or to transact business within a district under 15 U.S.C.A. § 22 when one of them is found or transacts business within the district." Defendant Clayco, in reply, questions whether the *Giusti* theory is presently tenable in any form, and, if so, whether it is as broad as plaintiffs construe it.

In the Ninth Circuit, any assessment of the possible applicability of the co-conspirator principle requires an understanding of *Giusti* itself. Examination of the decision immediately discloses that the case is not direct authority on the sweep of the Clayton Act's venue provisions. Rather, *Giusti* involved an interpretation of the service of process requirements of the California Civil Code. In holding that the out-of-state defendant had "transacted business" in California within the meaning of then section 406a of the California Civil Code,[7] the court decided first that the acts of the de-

[7]Presently § 6504, Cal.Corp. Code.

fendant's co-conspirators alleged in the complaint constituted "transacting business" in California, and then applied an agency principle to impute this "transacting" to the foreign defendant. 156 F.2d at 353-354.

The co-conspirator theory of "transacting business" within the meaning of Section 12 of the Clayton Act—to which *Giusti* has been said to have given "illegitimate birth"[8]—has been rejected by the only court of appeals squarely confronted with it,[9] and has (in dictum) been termed "frivolous" by the Supreme Court.[10] While it has been observed, as plaintiffs herein stress, that the venue provisions for private antitrust actions are intended to give injured plaintiffs a broad choice of forum, the co-conspirator approach, allowing venue as to defendants with no direct contacts with the forum district, has frequently been rejected as an unwarranted extension, beyond the legislative purpose. *E.g.*, Bankers Life & Casualty Co. v. Holland, *supra;* Independent Prductions Corp. v. Loew's, Inc., 148 F.Supp. 460, 463 (S.D.N.Y.1957); West Virginia v. Morton International, Inc. 264 F.Supp. 689, 695 (D.Minn.1967); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 291 F.Supp. 252, 262 (E.D.Pa.1968); Byrnes, *supra,* 11 Antitrust Bull. at 895-896. One major vice of the

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[8]Byrnes, Bringing the Co-Conspirator Theory of Venue Up-to-Date and into Proper Perspective, 11 Antitrust Bull. 889, 892 (1966).

[9]Bertha Building Corp. v. National Theatres Corp., 248 F.2d 833, 836 (2nd Cir. 1957), cert. den., 356 U.S. 936, 78 S.Ct. 777, 2 L.Ed.2d 811 (1958); *see* H. L. Moore Drug Exchange, Inc. v. Smith, Kline & French Laboratories, 384 F.2d 97, 98 (2nd Cir. 1967).

[10]Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 384, 74 S.Ct. 145, 98 L.Ed. 106 (1953); *see also id.* at 385-386, 74 S.Ct. 145 (Frankfurter, Jackson, and Minton, J.J., dissenting).

theory, it has been noted, is that under it a defendant could establish the claim of improper venue only after submitting to a trial on the merits. *See* West Virginia v. Morton International, *supra*, 264 F.Supp. at 695; Byrnes, *supra*, 11 Antitrust Bull. at 896.

Several of the district courts in the Ninth Circuit that have admitted co-conspirator venue under 15 U.S.C. § 22 have done so out of a belief that the result was compelled in the circuit by *Giusti* itself. *See* De Golia v. Twentieth Century-Fox Film Corp., 140 F.Supp. 316, 317 (N.D.Cal.1954); California v. Brunswick Co., 32 F.R.D. 36, 38 (N.D.Cal.1961); *cf.* Haleiwa Theatre Co. v. Forman, 37 F.R.D. 62, 65 (D.Haw. 1965). But the most recent Ninth Circuit decision discussing *Giusti* in the antitrust context intimates that this is, at best, an open question. The court of appeals stated in Hayashi v. Red Wing Peat Corp., 396 F.2d 13, 15 (9th Cir. 1968):

> Since appellants disavowed reliance upon acts of alleged co-conspirators within the district as affording a basis for venue, we need not consider whether Giusti v. Pyrotechnic Productions [sic], Inc., 156 F.2d 351, 354 (9th Cir. 1946) holds that venue may be established on this basis, and, if it does, whether, as appellee argues, such a holding is inconsistent with Bankers Life & Casualty Co. v. Holland, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953). See Bertha Bldg. Corp. v. National Theatres Corp., 248 F.2d 833 (2d Cir. 1957); H. L. Moore Drug Exchange, Inc., supra.

Whatever the authority of *Giusti* in the antitrust realm, careful examination of the case and of subsequent decisions explicating it discloses that its delineation of what may be deemed "transacting business"

in a district by foreign co-conspirators is not as sweeping as plaintiffs assert. Plaintiffs' contention that any transacting of business in the district by a defendant may be imputed to co-conspirators—whether or not connected with the conspiracy—carries the co-conspirator rationale beyond its own logic, because one co-conspirator is deemed the agent of the others only with respect to activities in furtherance of the conspiracy. This limitation is implicit in those cases that have viewed *Giusti* as allowing venue for absent co-conspirators only when conspiratorial agreement or overt acts are alleged to have occurred within the district. *E.g.*, Ziegler Chemical & Mineral Corp. v. Standard Oil of California, 32 F.R.D. 241, 243 (N.D.Cal. 1962).

But *Giusti* itself is even more limited: in order to hold that the absent co-conspirator had transacted business within California, the court in *Giusti* not only relied upon acts of conspiracy in the state but was at pains to establish that these acts themselves constituted the transaction of business. 156 F.2d at 353-354. Thus, to come within *Giusti* the complaint must allege conspiratorial agreement or overt acts within the district that constituted the transaction of business. Several district courts have concurred in this precise reading of *Giusti*. *E.g.*, California Clippers, Inc. v. United States Soccer Football Ass'n, 314 F.Supp. 1057, 1067 (N.D.Cal.1970); West Virginia v. Morton International, *supra*, 264 F.Supp. at 694-695; Commonwealth Edison Co. v. Federal Pacific Electric Co., 208 F.Supp. 936, 942-943 (N.D.Ill.1962); Periodical Distributors, Inc. v. American News Co., 1961 Trade Cas. ¶ 70,011 at 78,008-09 (S.D.N.Y. 1961).

Reasoning, then, from *Giusti* as properly construed, since the instant complaint nowhere alleges as part of

the conspiracy any doing of business in the Central District of California, Clayco cannot be deemed to be transacting business here. It therefore appears that both jurisdiction, *see* International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), and venue, 15 U.S.C. § 22, are lacking as to Clayco. Since Clayco does not come within the terms of 15 U.S.C. § 22, service of process upon its statutory agent in Delaware pursuant to that section was insufficient as to Clayco, *see* West Virginia v. Morton International, *supra*, 264 F.Supp. at 690, and a fortiori also defective as to Clayman, who unrebuttedly affirms that he was never served personally, but rather received a copy of the complaint only in his capacity as president of the corporate defendant.

Plaintiffs urge, finally, that the present disposition of Clayco's motion should be held in abeyance so that they may proceed, by discovery, to attempt to bolster their claim that jurisdiction and venue are properly laid. The procedure on a motion such as the present one is within the discretion of the district court, *see* Gibbs v. Buck, 307 U.S. 66, 71-72, 59 S.Ct. 725, 83 L.Ed. 1111 (1939). Since plaintiffs have at no time during this proceeding offered any allegations that might bring them within the venue principle upon which they rely, and considering also the questionable authority of that principle, it would not appear appropriate for this court to stay its decision.

For the above-stated reasons, the motion to dismiss the complaint by Clayco Petroleum Corporation and its president, Clayman, will be granted on all three grounds asserted.

THE BUTTES DEFENDANTS' MOTION

The Buttes defendants do not contest personal jurisdiction or venue. Rather, they urge dismissal of the complaint and action on the grounds of lack of subject matter jurisdiction, failure to state a claim upon which relief may be granted, and failure to join parties who must be deemed "indispensable" under Rule 19, Fed. R.Civ.P. Their argument is comprised of five separate legal contentions, all of which require for analysis a statement of the facts pleaded in the complaint.

Plaintiffs assert that, pursuant to their efforts to develop and exploit the petroleum reserves underlying the offshore waters of the Trucial States in the Persian Gulf, they obtained in 1969 a concession from the Ruler of Umm al Qaywayn, one of the Trucial States, granting plaintiffs the exclusive right to explore for, extract, and sell oil underlying the territorial and offshore waters of Umm al Qaywayn. It was plaintiffs' purpose to import into the United States for refining any oil extracted pursuant to this concession. Owing to the unavailability of the Suez Canal, such importation would be made through Pacific Coast seaports in California. The concession agreement is by its own terms to terminate if oil is not discovered in "commercial quantities" (Compl. ¶ 22(b)) in the concession area within four years of the concession's effective date.

Immediately prior to their obtaining the concession from Umm al Qaywayn, plaintiffs allege, defendants Buttes and Clayco had themselves unsuccessfully attempted to negotiate such a concession. Subsequent to plaintiffs' success with Umm al Qaywayn, Buttes and Clayco allegedly negotiated, in December, 1969, a

comparable concession by the Ruler of the Trucial State Sharjah, covering its territorial and offshore waters.

The mainland areas of Sharjah and Umm al Qaywayn are situated contiguously at the southeastern end of the Persian Gulf. Sharjah, moreover, asserts sovereignty to the island of Abu Musa, located 38 miles off the coast of its mainland. Plaintiffs allege that at the time defendants' concession was granted by Sharjah, it claimed a territorial waters domain of three miles, including a belt extending that distance seaward from the low water mark of Abu Musa. The territorial waters perimeter off Abu Musa allegedly constituted a boundary between the Sharjah and Umm al Qaywayn concession areas that was acknowledged by both states. A map indicating this boundary is attached to the complaint, and plaintiffs allege that confirmatory copies of this map were included in the two concession agreements when each was submitted to and approved by the British Foreign Office, pursuant to a treaty still in force between Britain and the Trucial States.

Still friendly in the beginning of 1970, plaintiffs and Buttes agreed to exchange information gleaned from seismic tests to be made of the seabed and subsoil underlying their respective concession areas. The results of plaintiffs' tests indicated the presence of oil in extensive quantities at a point within their alleged concession area nine miles seaward from the low water mark of Abu Musa. Plaintiffs proceeded to prepare to drill in this area, expending several million dollars for that purpose by the time the complaint was filed.

The complaint alleges that after learning in March, 1970 of the apparent richness of plaintiffs' concession area, defendants entered into and acted upon a con-

spiracy to misappropriate plaintiffs' rights to the oil underlying the Persian Gulf nine miles off Abu Musa. The execution of this conspiracy, as alleged, involved a multi-faceted international intrigue whose detail, relevant to the grounds of the instant motion to dismiss, is set out in the margin in the words of the complaint.[11] Briefly stated, after unsuccessfully sub-

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[11]"22. Plaintiffs are informed and believe and thereon allege that to that end and for that purpose, defendants combined and conspired with each other to do, and pursuant to said combination and conspiracy did, among others, the following acts under the following circumstances:

"(a) Undertook falsely to claim and fraudulently to appropriate, under color of their aforesaid agreement with the Ruler of Sharjah, all exploratory rights anywhere within an area bounded by a line twelve nautical miles seaward from the low water mark on the island of Abu Musa, notwithstanding the rights previously granted plaintiffs up to a line only three miles seaward from Abu Musa.

"(b) The agreement granting the Occidental concession provides, in part, that if petroleum in commercial quantities is not discovered within four years of its effective date, the agreement shall terminate and be of no further force or effect. Defendants, knowing of this provision and for the purpose of causing the Occidental concession to lapse, on or about March 25, 1970, acting through Buttes, submitted to the British Political Agent in the Trucial States for approval, in accordance with the treaty mentioned in paragraph 16 above, plans prepared in the United States for drilling for oil and gas by Buttes for itself and Clayco at a location which defendants well knew was wholly within the area of the Occidental concession and wholly outside the area of the concession granted Buttes and Clayco by the Ruler of Sharjah. The British Political Agent rejected said plans.

"(c) Defendants then induced the Ruler of Sharjah, for his own personal gain and benefit, to protest the rejection by the British Political Agent of the aforesaid plans of Buttes and falsely to assert and claim that the location therein specified was within the concession area granted to Buttes and Clayco by him.

"(d) Defendants further induced and procured the Ruler of Sharjah to present, in support of his assertion and claim, a decree purporting to have been made prior to the grant of the Occidental concession, but in fact prepared after said concession was granted, wherein and whereby the Ruler of Sharjah asserted in substance and effect that the territorial waters of Sharjah, its de-

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mitting to the British Political Agent in the Trucial States a plan whereby Buttes would drill for oil in a portion of the Occidental-Umm al Qaywayn concession area, defendants "induced and procured" the

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pendencies and islands extended twelve nautical miles seaward from their low water lines. Said decree was in effect an attempted confiscation, without compensation, of plaintiffs' vested property rights in the oil and gas to which they were entitled under the aforesaid agreement between Occidental of Umm Al Qaywayn, Inc., and the Ruler of Umm Al Qaywayn, in violation of international law, which defendants arranged to have issued for the purpose of eliminating plaintiffs from competition with them in the exploration and production of oil from the seabed underlying the offshore waters of the Trucial States. Neither said purported decree nor any claim of the Ruler of Sharjah such as that made therein, had theretofore been published or otherwise made known by the Ruler of Sharjah to the British Foreign Office, the British Political Agent in the Trucial States, the Ruler of Umm Al Qaywayn, or any of the rulers of the other Trucial States; in fact, in 1964 the Ruler of Sharjah had signed a statement acknowledging his offshore right to extend only to three miles seaward from Abu Musa.

"(e) The British Political Agent in the Trucial States rejected the protest and the decree of the Ruler of Sharjah and thereupon Buttes and Clayco induced and procured the Ruler of Sharjah, on or about April 2, 1970, to designate and appoint as his legal advisor in the matter one of the attorneys for Buttes and Clayco.

"(f) On or shortly after April 2, 1970, Buttes and Clayco and the Ruler of Sharjah submitted to the British Foreign Office for approval a purported amendment of the aforementioned agreement between them, which amendment purported to extend Buttes' and Clayco's drilling rights to a line twelve nautical miles seaward from the low water lines of Sharjah, its dependencies and islands, all in violation of international law and of the rights of the plaintiffs, as aforesaid.

"(g) Defendants induced and procured the Ruler of Sharjah to issue and publish a second purported decree dated April 5, 1970, purporting to supplement the aforementioned decree which had purported to have been made prior to the granting of the Occidental concession, which second decree attempted to appropriate the Occidental concession in violation of international law.

"(h) On May 16, 1970, after recommending the refusal of permission to Buttes and Clayco to drill outside their concession area, the British Foreign Office, pursuant to the treaty and undertaking set forth in paragraph 16 above, requested the Ruler of Sharjah to take no action to give effect to his aforementioned de-

Ruler of Sharjah to claim ownership of the oil-rich portion of plaintiffs' concession area by preparing and submitting to the British Agent a concession amendment and two decrees, one of the latter fraudulently backdated to represent that prior to the granting of plaintiffs' concession by Umm al Qaywayn, Sharjah had claimed territorial waters extending *twelve* miles seaward from the low water mark of its territory, including Abu Musa. These representations did not convince the British Foreign Office, which ordered the Ruler of Sharjah to desist and acknowledged the authority of the Occidental-Umm al Qaywayn concession. Defendants allegedly then enlisted the aid of other sovereigns: they "induced and procured" the

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crees and to make no further decrees and notified said Ruler that operations by plaintiffs were to proceed on the basis of the concession agreement as originally signed between the Ruler of Umm Al Qaywayn and Occidental of Umm Al Qaywayn, Inc. Thereupon, in the latter part of May 1970, defendants induced and procured the National Iranian Oil Company to assert at this time that the island of Abu Musa was Iranian territory and that the territorial waters of Iran in respect of such island extend to a line twelve nautical miles seaward from its low water mark.

"(i) In the latter part of May 1970, defendants induced and procured personnel of the British Foreign Office to request of plaintiffs that they not commence drilling operations, which they were then prepared to commence, until June 1, 1970, pending the resolution of the claims of the Ruler of Sharjah and the National Iranian Oil Company with respect to the island of Abu Musa and its territorial waters, which said claims defendants had caused to be made in pursuance of their intent as aforesaid.

"23. Beginning May 27, 1970, plaintiffs' personnel and equipment, standing ready near the Occidental concession to commence drilling operations, were menaced and threatened by armed surface ships and airplanes of the British Armed Forces. On June 1, 1970, plaintiffs' seagoing equipment was boarded under force by the British Royal Navy. On June 3, 1970, over his protest and acting under the threat of exile, and after his home had been buzzed by airplanes of the British Royal Air Force and surrounded by British soldiers, the Ruler of Umm Al Qaywayn directed plaintiffs not to drill in the area claimed to be within the territorial waters of Sharjah and Iran. Plaintiffs were forced to abandon indefinitely their plans to commence drilling operations.

National Iranian Oil Company, in May, 1970, to claim Iranian sovereignty over Abu Musa and the waters twelve miles seaward therefrom; and defendants thereafter further "induced and procured" the British Foreign Office to request that plaintiffs refrain from their imminent drilling operations until the claims of Sharjah and of the Iranian Company could be resolved. British ships and aircraft menaced plaintiffs' personnel and equipment on the drilling site, and on June 1, 1970, members of the Royal Navy forcibly boarded plaintiffs' equipment.[12] Two days later the Ruler of Umm al Qaywayn directed plaintiffs not to drill in the disputed area; this order, which had the effect of suspending plaintiffs' intended drilling operations under their concession, was allegedly the consequence of threats of exile and acts of military intimidation by British forces made to the Ruler of Umm al Qaywayn. The threats against the Ruler of Umm al Qaywayn, and his order to plaintiffs, were allegedly "direct consequences, fully intended and expected by the defendants, of the conflicting and fraudulent claims with regard to the island of Abu Musa and its territorial waters, which the defendants had induced and procured." (Compl. ¶ 24). The intended upshot of this intrigue, the complaint alleges, is that following the withdrawal of the British from the Persian Gulf area in 1971 defendants will arrange with the Ruler of Sharjah to extract oil and gas from areas covered by plaintiffs' concession.

To remedy the injury suffered from this conspiracy, the plaintiffs request treble their damages of $100 mil-

[12]The same day, Occidental of Umm al Qaywayn, Inc., filed suit in Britain against the British government, seeking declaratory relief and damages as a result of this naval episode.

lion—the estimated worth of the oil in the concession area—as well as extensive equitable relief, to wit, an injunction restraining defendants or any persons operating in concert with them from disputing the validity of the Occidental concession as alleged in the complaint, from interfering with plaintiffs' operations in the waters of the Trucial States, and from extracting oil from the area of the Occidental concession; in the alternative to this last demand, plaintiffs request the impressment of a trust for their benefit upon any revenues derived by defendants or those acting for them from any part of the plaintiffs' concession area.

The Buttes defendants urge five arguments to defeat the complaint. First, they assert that this court lacks jurisdiction of the subject matter of the action under the antitrust laws because the complaint fails to allege a substantial anti-competitive effect upon United States commerce. Second, defendants urge, subject matter jurisdiction is lacking because the complaint sets forth an international boundary dispute, which is not amenable to decision in the courts of the United States. Third, defendants claim that Sharjah, Umm al Qaywayn, Iran, and Great Britain are parties whose joinder is necessary under Rule 19(a) of the Federal Rules of Civil Procedure, and without whose presence the action should be dismissed pursuant to section (b) of Rule 19 — in more traditional language, that the four sovereigns are "indispensable" to the action. Fourth, the defendants contend that since the complaint attacks activities undertaken to influence governmental conduct, this case is not within the subject matter of the antitrust laws, as interpreted by the Supreme Court in Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523,

5 L.Ed.2d 464 (1961), and United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Fifth and finally, defendants argue that because the conspiracy and damage complained of are based upon the conduct of several sovereigns, this court is barred from adjudicating plaintiffs' claims by the act of state doctrine.

Effect on American Commerce

The Buttes defendants first contend that jurisdiction of this case requires "a substantial anti-competitive effect on American commerce," and that such an effect has not been demonstrated by the complaint. On this basis the court is urged to dismiss the complaint for want of subject matter jurisdiction.

The trade and commerce allegedly restrained in this case involved plaintiffs' intended extraction and importation of oil from the territorial waters of the Trucial States. It would therefore appear that the case is governed by the standards of jurisdiction applicable to restraints of "foreign commerce."[13]

That *some* effect on our foreign commerce is a prerequisite to jurisdiction is evident from the text of the antitrust statutes here involved.[14] Defendants assert

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[13]For this reason Page v. Work, 290 F.2d 323 (9th Cir.) cert. den., 368 U.S. 875, 82 S.Ct. 121, 7 L.Ed.2d 76 (1961), and David Cabrera, Inc. v. Union de Choferes y Duenos de Camiones Hermanados de Puerto Rico, 256 F.Supp. 839 (D.P.R.1966), relied upon by defendants, are inapposite. The standard of "substantial effect" laid down in those cases defines antitrust jurisdiction over restraints of intrastate, as contrasted with interstate, business. *See also* Lieberthal v. North Country Lanes, 332 F.2d 269 (2nd Cir. 1962); 1 J. Von Kalinowski, Antitrust and Trade Regulation § 5.01 [4], at 5-98—102 (1969).

[14]*Compare* Sherman Act § 1, 15 U.S.C. § 1 ("Every contract * * * in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *.") *and*

that the effect must be "a substantial anti-competitive" one. They rely on the following language from the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, at 76:

> We feel that the Sherman Act applies only to those arrangements between Americans alone, or in concert with foreign firms, which have such substantial anti-competitive effects on this country's "trade or commerce * * * with foreign nations" as to constitute unreasonable restraints.

But this quotation seemingly states the criterion for a Sherman Act *violation*. "Substantial anti-competitive effect" is used, in the above text, to qualify "unreasonable restraints"; and it is only unreasonable restraints that Section 1 of the Sherman Act condemns. Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). *See* Beausang, The Extraterritorial Jurisdiction of the Sherman Act, 70 Dick.L.Rev. 187, 191 (1966): "An 'affect' is a necessary element of *jurisdiction* * * *; a direct and substantial 'affect' is necessary for Sherman Act *violations*. The problem arises when the standards of illegality (which might be modified to promote foreign trade) are confused with the jurisdictional feature of the 'affect of foreign commerce' " (emphasis in original).

In reviewing the cases, Von Kalinowski notes the confusion evident therein:

> The cases that used the word "affect" have said that a restraint must (1) "directly affect," or (2) "substantially affect," or (3) "directly and substantially affect," or (4) simply "affect" the flow of foreign commerce.

Sherman Act § 2, 15 U.S.C. § 2 ("Every person who shall monopolize * * * any part of the trade or commerce among the several

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1 J. Von Kalinowski, *supra*, § 5.502[2], at 5—120 (footnotes omitted). He concludes that "[t]he better view would seem to be that any effect that is not both insubstantial and indirect will support federal jurisdiction under Section 1." *Id.* at 5—121—22.

The interference with plaintiffs' business of extracting and importing oil into the United States, alleged in the complaint, is certainly a "direct" effect on our foreign commerce.[15] On this basis, the court is disposed to hold that the complaint alleges a sufficient effect on foreign commerce. Moreover, since the standard urged by defendants is largely coterminous with the scope of proof required to establish plaintiffs' section 1 case on the merits, dismissal now on the grounds that that standard has not been met would be premature. In urging dismissal, defendants stress such factors as the smallness of the Buttes Company in relation to plaintiff Occidental Petroleum Corporation, the confined geographical area of plaintiffs' concession, the presently speculative value of that concession, and the presence in the Persian Gulf of numerous other companies extracting oil for importation into the United States. These are matters that would appear to bear upon proof of plaintiffs' claims of antitrust violations; they cannot serve at this stage to defeat jurisdiction.

States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *.") *with* Clayton Act §§ 4, 16, 15 U.S.C. §§ 15, 26 (incorporating by reference the former two sections).

[15]The Buttes defendants read the complaint as charging, at worst, that Buttes and Clayco, rather than plaintiffs, would obtain and import any oil derived from the disputed portion of the plaintiffs' concession. From this they reason that *no* effect on American commerce is shown, because the oil would at all events enter the stream of commerce. This argument begs the issue. When control of an item in commerce is wrested from one competitor by another, the commerce of the article is to that extend "affected," regardless of the ultimate disposition of the commodity.

Boundary Dispute

The remaining points of the Buttes defendants' motion reflect the unconventional nature of this lawsuit, as one arising out of the claims and acts of a number of foreign states. The initial and broadest contention posed respecting these circumstances is that the complaint demands that the court decide the boundary dispute pending between the two Trucial States whose concessionaires are the principal parties to this case; therefore, defendants say, the complaint fails for want of subject matter jurisdiction.

The determination of foreign states' boundaries is certainly not a permissible function of this court. In our system, the questions of what are a country's boundaries, or of what nation has sovereignty over a certain piece of territory, are not for the judiciary to decide; they are political questions, upon which the courts must be guided and bound by the pronouncements of the executive. Williams v. Suffolk Insurance Co., 38 U.S. (13 Pet.) 415, 10 L.Ed. 226 (1839); Cheng Fu Sheng v. Rogers, 177 F.Supp. 281 (D.D.C. 1959), rev'd on other grounds, 108 U.S.App.D.C. 115, 280 F.2d 663, cert. den., 364 U.S. 891, 81 S.Ct. 222, 5 L.Ed.2d 187 (1960); *see* Jones v. United States, 137 U.S. 202, 11 S.Ct. 80, 34 L.Ed. 691 (1890). Authoritative judicial resolution of international boundary disputes is a function not of domestic courts, but of international tribunals, acting upon the consent of the contestant states. *See generally* A. Cukwurah, The Settlement of Boundary Disputes in International Law (1967).[16]

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[16]Along similar lines, mediation has been instituted to attempt a resolution of the instant dispute between Sharjah and Umm al Qaywayn. As presented to this court in an exhibit, the

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Defendants stress that the plaintiffs demand an injunction protecting their rights to extract oil from the area claimed by Sharjah and Umm al Qaywayn. Since these rights are derived from Umm al Qaywayn, it is reasoned, decision for plaintiffs would require this court to decide the territorial dispute in favor of that state. Moreover, such an adjudication would allegedly establish, by effect and by implication, the superiority of Umm al Qaywayn's claim over that of Sharjah. For these reasons defendants say that the complaint demands decision of an international boundary dispute.

These arguments underscore some important aspects of this case. It is true that the adjudication and order requested by plaintiffs would determine against Sharjah's concessionaires what is apparently the major stake of the pending international dispute—the right to extract oil from the disputed area off Abu Musa. Moreover, the establishment of plaintiffs' claims would involve a finding that Sharjah attempted to usurp Umm al Qaywayn's acknowledged rights to the disputed area. The concerns aroused by these aspects of the case are, however, more appropriately addressed by succeeding points of this motion, dealing with "indispensable parties" and the act of state doctrine.

Although the factual setting and the relief demanded in this case center around the territorial dispute between Sharjah and Umm al Qaywayn, the complaint does not require an explicit or implicit adjudication of those states' rights to the disputed territory. Plaintiffs

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terms of reference for the mediator—who is to be appointed by the British government—specify as one point of contention the respective rights of the oil concessionaires, parties to this case. The terms of reference further prescribe that the mediator is to enjoy the assistance of these oil companies. Iran is apparently not a party to this mediation.

seek, essentially, to prove a conspiracy, unlawful under the antitrust laws, in the clouding of the boundary question, and to remedy the injury done them by that conspiracy. Their claim is, as it were, framed in tort rather than as a suit to quiet title. Absent is any requirement that this court undertake a determination of foreign boundaries—a task that the court is admittedly neither suited nor authorized to pursue.[17] The instant ground of the motion to dismiss must be denied.

"Indispensable Parties"

The Buttes defendants next assert that Sharjah, Umm al Qaywayn, Great Britain, and Iran are, in the traditional language, "indispensable parties" to this case. This question is governed by Rule 19 of the Federal Rules of Civil Procedure, which was drastically rewritten in 1966. The present terms of Rule 19[18]

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[17]Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 461 & n. 20, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) (White, J., dissenting).

[18]Rule 19 provides as follows:

Joinder of Persons Needed for Just Adjudication

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)—(2) hereof

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demand a two-step inquiry: first, is the party one who should be "joined if feasible," within the terms of paragraph (a) of the Rule; and second, if he is but he cannot be made a party, should the action "in equity and good conscience" be dismissed, pursuant to the terms of paragraph (b). Particularly as presently rewritten, Rule 19 directs a pragmatic analysis, not just one dictated by the application of formal categories. Note of the Advisory Committee on Civil Rules, 39 F.R.D. 69, 90-93 (1966); *see* Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv.L. Rev. 356, 363, 367 (1967). The rule instructs the court to look into the actual practical effects a judgment may have upon the absent party and those who are present as parties.

Defendants' primary arguments concern the alleged "indispensability" of Sharjah. That state indeed has interests that could be affected by relief that plaintiffs request. Defendants assert that the contract between Sharjah and Buttes-Clayco covers part of the area that

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cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) *Pleading Reasons for Nonjoinder.* A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)—(2) hereof who are not joined, and the reasons why they are not joined.

(d) *Exception of Class Actions.* This rule is subject to the provisions of Rule 23.

plaintiffs claim under their concession with Umm al Qaywayn. If so, Sharjah's contractual rights stand to be abridged by an injunction restraining her concessionaires from operating in any part of the area claimed by plaintiffs. A similar adverse effect on Sharjah's contractual expectancy would accrue from the imposition of a trust that disgorged from defendants all revenues obtained from drilling in the area, including the proceeds they were obligated to pay to Sharjah[19] In sum, to paraphrase Rule 19(a) (2) (i), Sharjah claims an interest relating to the subject of the action—the "subject of the action" being operations by Buttes-Clayco in any part of plaintiffs' alleged concession area—and a disposition in Sharjah's absence may impair or impede its ability to protect that interest.

At the same time, were an injunction issued or a trust set up that did not bind Sharjah, Buttes and Clayco would risk incurring inconsistent obligations, under the court's order on the one hand and under their contract with Sharjah on the other. This risk is another criterion warranting the joinder of Sharjah. Rule 19(a) (2) (ii).

From the above analysis, it appears that Sharjah is a "person to be joined if feasible" under Rule 19(a). *See* McConnell v. Dennis, 153 F.547 (8th Cir. 1907). Plaintiffs oppose this result, however, on the ground that Sharjah (as well as Umm al Qaywayn, Iran, and Great Britain) is a co-conspirator or joint tortfeasor.

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[19]It has not been made clear whether this is the intent of plaintiffs' request that "a trust be impressed, for the benefit of plaintiffs, on all revenues derived by the defendants and by any and all persons acting directly or indirectly for or on their behalf, or for or on behalf of [any] of them." Compl., Prayer ¶ 1(c), or whether this constructive trust demand envisions that Sharjah's share of the revenues be left alone. The latter approach, as noted below, would alleviate the prejudice to Sharjah and to defendants.

It has been held generally that antitrust co-conspirators need not be joined, *e.g.*, Georgia v. Pennsylvania R.R., 324 U.S. 439, 463, 65 S.Ct. 716, 89 L.Ed. 1051 (1945); similarly, for "a tortfeasor with the usual 'joint-and-several' liability," Advisory Committee's Note, *supra*, 39 F.R.D. at 91. However, these principles must be applied in context. In the present case, Sharjah's status as a joint tortfeasor would not as a practical matter negate its status as a contractual party, with interests that are covered by Rule 19(a).[20]

Assuming that joinder of Sharjah is impossible, because of sovereign immunity or lack of personal jurisdiction,[21] it must next be determined, pursuant to Rule 19(b), whether the case should continue in Sharjah's absence—i.e., whether that state is, in fact, "indispensable."

From among the factors enumerated in Rule 19(b) to aid the court in making this determination, "the shaping of relief" would afford means to avert the dilemma posed by Sharjah's contractual rights. For

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[20]There is authority to the effect that an antitrust suit will not be dismissed even in the absence of a co-conspirator whose contractual rights are directly challenged by the adjudication, or in any event stand to be adversely affected by it. Martin v. Chandler, 85 F.Supp. 131 (S.D.N.Y.1949); *see* United States v. National Lead Co., 63 F.Supp. 513, 525 & n. 8 (S.D.N.Y.1945), aff'd, 332 U.S. 319, 67 S.Ct. 1634, 91 L.Ed. 2077 (1947); *contra*, Bond v. Harris, 239 F.Supp. 427 (S.D.N.Y.1964). The cases so holding apparently reflect the general doctrine that the courts will proceed to enforce "public rights" even where the contractual rights of absent parties are as a result jeoparized. *See* National Licorice Co. v. NLRB, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940); SEC v. Royal Hawaiian Management Corp., No. 67-546-F (C.D.Cal., June 12, 1967). In the present case, however, the fact that the absent co-conspirator is a foreign country could present countervailing considerations against the court's obstructing or countermanding the performance of a contract with it. *Cf.* Note, Extraterritorial Application of the Antitrust Laws, 69 Harv.L.Rev. 1452, 1459-1461 (1956).

[21]*See, e.g.*, Zwack v. Kraus Bros. & Co., 237 F.2d 255, 259 (2nd Cir. 1956).

example, a constructive trust decree could be framed that left intact the share of the oil proceeds to which Sharjah was entitled under its concession. Under such an approach the prejudice to Sharjah (loss of oil rights) and to Buttes and Clayco (possible suit by Sharjah) could be "lessened or avoided," Rule 19 (b). A comparable result would obtain if the court refrained from awarding any equitable relief, but instead proceeded only with plaintiffs' claim for damages. *See* Advisory Committee's Note, *supra*, 39 F.R.D. at 92. With these alternatives available, it becomes evident that Sharjah is not an "indispensable" party to this case.

More easily resolved are defendants' assertions that Umm al Qaywayn, Iran, and Great Britain are "indispensable." With respect to Iran and Umm al Qaywayn, defendants' contentions are based essentially on the premise that the present suit will decide which state holds sovereign rights over the disputed Persian Gulf territory. But it has been determined above that title to the disputed area is *not* the subject of this action. As regards Great Britain, defendants stress that that country exercises supervisory power over the international relations of the Trucial States, and that in this capacity it has acted to prevent plaintiffs from drilling for oil in the disputed area. These facts apparently are adduced to indicate that Britain is a party in whose absence disposition of the case would be "incomplete" or "hollow,"[22] as prescribed in paragraph (a) (1) (i) of Rule 19. While this might be true with respect to the injunction sought by plaintiffs—because Britain would still be free to restrain their operations—that does not mean that the suit must be dismissed. *Cf.* United States v. National Lead Co., *supra*, 63 F.Supp.

[22]Advisory Committee's Note, *supra*, 39 F.R.D. at 91.

at 525 and n. 8. The court has the power to issue a monetary decree instead of an injunction; and it cannot be denied that a money judgment against the defendants would constitute "complete relief * * * accorded among those already parties," Rule 19(a) (1).

Sharjah, Umm al Qaywayn, Iran and Great Britain are not "indispensable parties," and the action need not be dismissed pursuant to Rule 19, Fed.R.Civ. P.

Foreign Government Action

The final two points of this motion are addressed to the peculiar nature of the conspiracy alleged in this case. As detailed above, the defendants are charged, exclusively, with "inducing and procuring" assorted executive acts by foreign states; and it is plainly these acts that allegedly have caused and threatened to cause the damage plaintiffs seek to remedy. The Buttes defendants contend that the foregoing circumstances preclude the court from adjudicating this case. Two doctrines are relied upon: the limitation of antitrust jurisdiction articulated in Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and the rule of judicial abstention known as the act of state doctrine. The two rules spring from different considerations.

In *Noerr*, the Supreme Court unanimously decided that "the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." 365 U.S. at 136, 81 S.Ct. at 529. This interpretation of the Sherman Act was reaffirmed, with further elucidation,[23] in United Mine

[23]In reversing the decision below, the Court in *Pennington* reaffirmed that "[j]oint efforts to influence public officials do

Workers of America v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Since *Noerr* and *Pennington* construed the Sherman Act with reference to influencing American state and federal officials, the threshold question here is whether the teaching of those cases is applicable when foreign governments are involved.

There is no direct authority on this question. The Buttes defendants, however, contend that *Noerr* was implicitly extended to cover the solicitation of foreign governments, in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S.Ct. 1404, 8 L.Ed.2d 777 (1962). *Continental Ore* was an antitrust case in which a subsidiary of Union Carbide had allegedly boycotted the plaintiff in the course of exercising discretionary authority as the purchasing agent of the Canadian government. The Court distinguished *Noerr* on ground that "[r]espondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707, 82 S.Ct. at 1415.[24] Defendants insist that in distinguishing *Noerr* only on its facts, the Court in *Continental Ore* decided sub silentio that the rule of *Noerr* would have applied had there been solicitation of foreign government action. At least one

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not violate the antitrust laws even though intended to eliminate competition." 381 U.S. at 670, 85 S.Ct. at 1593; *accord, Noerr, supra,* 365 U.S. at 138-140, 81 S.Ct. 523. The Court went on to state that "[s]uch conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670, 85 S.Ct. at 1593.

[24]In *Pennington* the Court similarly distingushed *Continental Ore,* emphasizing that "[t]he purchasing agent * * * was not a public official but the wholly owned subsidiary of an American corporation alleged to be a principal actor in the conspiracy." 381 U.S. at 671 n. 4, 85 S.Ct. at 1594.

commentator agrees precisely.[25] However, an at least equally tenable interpretation of *Continental Ore* is that the Court deemed it unnecessary, in view of the facts, to decide the legal question at all.

Examination of the premises underlying *Noerr* indicates that the case's rationales do not readily fit into a foreign context, such as the facts of this case. One of the roots of the *Noerr* decision was a desire to avoid a construction of the antitrust laws that might trespass upon the First Amendment right of petition. 365 U.S. at 138, 81 S.Ct. 523. The constitutional freedom "to petition the Government" carries limited if indeed any applicability to the petitioning of foreign governments.[26] A second basis of *Noerr* is a concern with insuring that, "[i]n a representative democracy such as this," law-making organs retain access to the opinions of their constituents, unhampered by collateral regulation. 365 U.S. at 137, 81 S.Ct. 523, 529. *Noerr* has been held inapplicable to situations in which this relationship has not been deemed threatened. *See* George R. Whitten, Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 32-33 (1st Cir. 1970); Trucking Unlimited v. California Motor Transport Co., 432 F. 2d 755, 758 (9th Cir. 1970); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286, 1296 (5th Cir. 1971); Sacramento Coca-Cola Bottling Co., Inc. v. Chauffeurs, Teamsters

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[25]Graziano, Foreign Governmental Compulsion as a Defense in United States Antitrust Law, 7 Va.J.Int'l L. 100, 132 (1967).

[26]One authority extracts from *Noerr* and *Continental Ore* the notion that the antitrust laws do not apply to petitioning a *democratic government*. P. Areeda, Antitrust Analysis ¶ 187 & n. 206 (1967). This interpretation, not presently adopted herein, would in any event not cover much of the conduct alleged in the instant complaint.

and Helpers Local No. 150, 440 F.2d 1096, 1099 (9th Cir. 1971). The persuasion of Middle Eastern states alleged in the present case is a far cry from the political process with which *Noerr* was concerned.

In sum, the interests asserted in this case are dissimilar to those that Noerr was concerned with safeguarding; therefore, the wholesale application of that exception to the Sherman Act appears inappropriate. However, other considerations become prominent when acts of foreign governments are brought to bar—considerations reflecting a prudent allocation of competence between the American judiciary and executive in the field of foreign relations. The act of state doctrine is the relevant and dispositive principle on this motion to dismiss.

In Underhill v. Hernandez, 168 U.S. 250, 252, 18 S.Ct. 83, 84, 42 L.Ed. 456 (1897), the Supreme Court first definitively held that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." This "classic American statement of the act of state doctrine" was reaffirmed by the court most recently in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 416-418, 84 S.Ct. 923, 934, 11 L.Ed.2d 804 (1964). In the *Sabbatino* case, the bases of the doctrine were at last explicitly elaborated. The act of state doctrine, it was held, is not required by international law. 376 U.S. at 421-422, 84 S.Ct. 923. Nor is it compelled by notions of sovereign authority, although they "do bear upon the wisdom of employing" it. *Id.* Finally, the doctrine is not required by the Constitution. 376 U.S. at 423-424, 84 S.Ct. 923.

The act of state doctrine does, however, have "constitutional" underpinnings. It arises out of the

> basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere. 376 U.S. at 423, 84 S.Ct. at 938.

In sum, the doctrine is a reflection of the executive's primary competency in foreign affairs, and an acknowledgment of the fact that in passing upon foreign governmental acts the judiciary may hinder or embarrass the conduct of our foreign relations. *See* 376 U.S. at 427-428, 431-433, 84 S.Ct. 923.

Consideration of the act of state doctrine's relevance to the present case begins with one of the early act of state cases, American Banana Co. v. United Fruit Co., 160 F. 184 (C.C.S.D.N.Y), aff'd, 166 F. 261 (2nd Cir. 1908), aff'd, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826 (1909). The facts of that case are strikingly similar to those now before the court. A private defendant was sued under the Sherman Act for destruction of plaintiff's fledgling banana business in Panama and Costa Rica. The gravamen of the complaint was that the defendant had instigated and procured Costa Rican soldiers to seize and maintain control of plaintiff's plantation and supplies. The trial court dismissed the complaint, stating, "[i]t is impos-

sible to adjudicate this matter without sitting in judgment on the right of Costa Rico [sic] to do what was done * * * this court has no power to sit in judgment on the validity or legality of the act of any sovereign independent nation." 160 F. at 188. The circuit court of appeals affirmed, using the following language:

> Upon principle and authority, it follows that Costa Rica is entitled to immunity from any investigation of its sovereign acts by this court. The plaintiff, however, asserts that this immunity is only an immunity from suit which has no bearing upon the defendant's liability. But, as we have seen, the immunity is far broader than this. The validity of an act adtoped by a sovereign state cannot be inquired into at all—directly or collaterally—by the courts of another state. Relief must be sought in the courts of the former state or through diplomatic channels. 166 F. at 266.

On certiorari, the result was the same, Justice Holmes writing:

> The substance of the complaint is that, the plantation being within the de facto jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts. * * *

and then citing Underhill v. Hernandez (as had the two lower courts). 213 U.S. at 357-358, 29 S.Ct. at 513.

The significance of the *American Banana* case has been somewhat obscured by virtue of the fact that Justice Holmes's opinion expounds at some length a

restrictive view of Sherman Act jurisdiction, based upon the situs of primary conduct.[27] This aspect of the opinion has been distinguished in subsequent international antitrust cases, *e.g.*, United States v. Sisal Sales Corp., 274 U.S. 268, 276, 47 S.Ct. 592, 71 L. Ed. 1042 (1927); Continental Ore Co. v. Union Carbide & Carbon Corp., *supra*, 370 U.S. at 704-705, 82 S.Ct. 1404. But as those two cases intimate,[28] and as other analyses clearly establish,[29] the holding of

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[27]The more modern notion that Sherman Act jurisdiction may be grounded on effects in the United States or upon its commerce does not appear on the face of the opinion, but the general interpretation has been to regard the case as one in which no such jurisdictional facts were presented. *See* Steele v. Bulova Watch Co., 344 U.S. 280, 288, 73 S.Ct. 252, 97 L.Ed. 252 (1952); W. Fugate, Foreign Commerce and the Antitrust Laws 30-31 (1958).

[28]Both the *Sisal Sales* and *Continental Ore* cases steer clear of attaching antitrust liability to sovereign conduct or its inducement. The conspiracy attacked in *Sisal Sales* included not only the procurement of favorable foreign laws but also traditional independent market activity, and the Court noted the distinction, in the same breath with its holding distinguishing the "territorial" aspect of *American Banana*—"The United States complain * * * not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States." 274 U.S. at 276, 47 S.Ct. at 594; *see* dissenting opinion of Biggs, C. J., in Noerr Motor Freight v. Eastern R. R. Presidents Conference, 273 F.2d 218, 226 (3rd Cir. 1959), rev'd, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). In *Continental Ore*, the Court was careful to find that the Canadian government had neither approved nor compelled any of the challenged anti-competitive actions taken by a co-conspirator while exercising discretionary powers granted by that government. 370 U.S. at 706-707, 82 S.Ct. 1404, *cf.* 370 U.S. at 707-708, 82 S.Ct. 1404, discussed *supra*. These cases, which based liability on market conduct in the context of governmental permission, do not help plaintiffs here, for the conspiracy presently pleaded is made up exclusively of the inducement of sovereign acts. *See* 1 J. Von Kalinowski, *supra*, § 5.02[3] [b].

[29]*E.g.*, Steele v. Bulova Watch Co., 344 U.S. 280, 288, 73 S.Ct. 252, 97 L.Ed. 252 (1952); Fugate, Antitrust Jurisdiction

American Banana that has endured is that the act of state doctrine bars a claim for antitrust injury flowing from foreign sovereign acts allegedly induced and procured by the defendant. This holding would appear directly to control the present case.

Plaintiffs say that they do not complain of the acts of foreign states set forth in the complaint, but rather only of defendants' conduct in "catalyzing" those acts. This construction of the case is at odds with plaintiffs' papers in at least two crucial respects. In the first place, plaintiffs have in another phase of this motion dubbed the states involved in the present Persian Gulf controversy as co-conspirators. The implication to be drawn from this allegation is that plaintiffs do question the conduct of those states under the antitrust laws—an inquiry which the act of state doctrine surely bars. Second, the complaint charges that several of Sharjah's acts were violative of international law. This claim, too, is barred from American courts by the act of state doctrine—specifically by the *Sabbatino* decision. *See* 376 U.S. at 428, 430-431, 84 S.Ct. 923, 11 L.Ed.2d 804. Indeed, this portion of plaintiffs' pleading appears designed expressly to avoid the anticipated effect of the doctrine, by invoking an exception to it, which will be discussed shortly.

There is, moreover, a further dimension to this case's implication of foreign acts of state. Because a private antitrust claim requires proof of damage resulting from forbidden conduct, *e.g.*, Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742, 750-751 (9th Cir. 1936), cert. den. 299 U.S. 613, 57 S.Ct. 315, 81 L.Ed. 452 (1937); Winckler & Smith Citrus Products Co. v. Sun-

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and Foreign Sovereignty, 49 Va.L.Rev. 925, 926, 930, 932 (1963).

kist Growers, Inc., 346 F.2d 1012, 1014 & n. 1 (9th Cir.), cert. den., 382 U.S. 958, 86 S.Ct. 433, 15 L. Ed.2d 362 (1965), plaintiffs necessarily ask this court to "sit in judgment" upon the sovereign acts pleaded, whether or not the countries involved are considered co-conspirators. That is, to establish their claim as pleaded plaintiffs must prove, *inter alia,* that Sharjah issued a fraudulent territorial waters decree, and that Iran laid claim to the island of Abu Musa at the behest of the defendants.[30] Plaintiffs say they stand ready to prove the former allegation by use of "internal documents." But such inquiries by this court into the authenticity and motivation of the acts of foreign sovereigns would be the very sources of diplomatic friction and complication that the act of state doctrine aims to avert. *See Sabbatino, supra,* 376 U.S. at 423-424, 431-433, 84 S.Ct. 923.[31]

Instructive precedent for the present issues is found in Frazier v. Foreign Bondholders Protective Council, 283 App.Div. 44, 125 N.Y.S.2d 900 (1953). The plaintiffs there claimed that defendants had induced a breach of contract by Peru (the very theory of the action between the present parties in state court). Judge Botein dealt in the following language with

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[30]Plaintiffs contended at one point that the claim by the National Iranian Oil Company (Compl. ¶ 22(h)) was the act of a private commercial entity; but they later acknowledged that the claim was made on behalf of Iran, and by an instrumentality of that nation. *See* Waldron v. British Petroleum Co., 231 F. Supp. 72, 77 (S.D.N.Y.1964).

[31]*Compare* the characterization of the doctrine in Frazier v. Foreign Bondholders Protective Council, 283 App.Div. 44, 125 N.Y.S.2d 900, 903 (1953): "It is a doctrine born of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political. It has gained stature in the world of international diplomacy and politics, where an 'incident' involving the dignity of nations is measured by its explosive potential as well as its legal implications."

plaintiffs' objections to the interposition of an act of state defense:

> The plaintiffs moved to strike the defenses, urging that they do not seek damages from Peru for its breach of contract but from these private defendants for their own tortious conduct in inducing and procuring Peru to break its contract. * * *
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> The plaintiffs' characterization of the defenses as an attempt to immunize a private citizen for wrongdoing to another private citizen must be considered in juxtaposition to the assertion in their brief that such wrongdoing resulted in "an outright and unabashed repudiation" by Peru. Our courts are traditionally loath to resolve such issues.
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> * * * * * *
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> * * * Perhaps our courts should be even more sensitive to the involvements of a sovereign's action when the sovereign is not a party to the action, and the adjudication as it affects its prestige and dignity partakes of the nature of an ex parte proceeding. 125 N.Y.S.2d at 901, 903, 905.

(On remand, defendants' motion for summary judgment was granted. 133 N.Y.S.2d 606 (Sup. 1954).)

It thus appears prima facie that the act of state doctrine precludes further adjudication of the present case. Plaintiffs, however, offer several further arguments against this result. They first contend that the doctrine has been sapped of its vitality and rationale by the so-called "Sabbatino Amendment," 22 U.S.C. §2370(e) (2).

At issue is the significance of the "Sabbatino Amendment" vis-a-vis the act of state doctrine in general. From the plain wording and history of the legislation, that issue is easy to resolve. The statute prescribes, in relevant part:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law * * *: *Provided*, That this subparagraph shall not be applicable * * * (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

In intent and in actual effect, then, the statute "reverses"—in the absence of a request by the executive—the specific holding of the *Sabbatino* case, that

> the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even

> if the complaint alleges that the taking violates customary international law. 376 U.S. at 428, 84 S.Ct. at 940.

Congress has thus legislated a judicial "presumption" with respect to the foreign relations demands of a limited category of act of state cases. As a matter of record, even this narrow presumption did not conform to the realities of executive judgment. The executive strenuously opposed the enactment of the legislation,[32] and it became law only as a rider to the Foreign Assistance Act—which is why the provision is called the "Sabbatino *Amendment*." In any event, this exception is by its terms extremely narrow, and in all other cases the act of state doctrine remains the law of the land. The legislation has been strictly construed, and courts have continued to rely upon act of state in cases deemed not precisely fitting the statutory language. *See* French v. Banco Nacional de Cuba, 23 N.Y.2d 46, 295 N.Y.S. 2d 433, 242 N.E.2d 704 (1968) (no confiscation or taking, and no claim of right to property); F. Palico y Compania, S.A. v. Brush, 256 F.Supp. 481 (S.D.N.Y. 1966), aff'd, 375 F.2d 1011 (2nd Cir. 1967) (no violation of international law). Plaintiffs' assertion that the Amendment in effect pulled the rug out from under the act of state doctrine in all cases is groundless.

Indeed, plaintiffs appear to recognize this, for their next argument against the application of the act of

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[32]Hearings on Foreign Assistance Act of 1964 Before the Sen. Comm. on For. Rel., 88th Cong., 2nd Sess., App. 618-19 (1964) Hearings on Foreign Assistance Act of 1965 Before the House Comm. on For. Aff. 89th Cong., 1st Sess., pt. 8, at 1234-71 (1965). In addition, the executive successfully argued in *Sabbatino* against judicial adoption of the Amendment's approach. 376 U.S. at 436, 84 S.Ct. 923; Brief for the United States as Amicus Curiae 43-46.

state doctrine to this case is that the limited exception created by the statute controls here. Plaintiffs have charged in their complaint that the two territorial waters decrees issued by Sharjah, and the amendment of its contract with Buttes and Clayco, constituted "in effect an attempted confiscation, without compensation, of plaintiffs' vested property rights in the oil and gas to which they were entitled * * * in violation of international law." Compl. ¶ 22(d); *see* ¶ 22(f), (g). This pleading is insufficient to invoke the Sabbatino Amendment for several reasons. In the first place, the charge of an attempted confiscation, invalid under international law, has not been directed against the other acts of state—by Sharjah and also by Iran, Umm al Qaywayn, and Great Britain—adjudication of which would form an integral part of plaintiffs' case. Moreover, the portion of the complaint here in issue does not itself fall within the Sabbatino Amendment's ambit, for the simple reason that the complaint refers to an "attempted confiscation," whereas the statute applies only to a "confiscation or other taking." It is clear from a reading of the complaint as a whole that the conduct of Sharjah did not amount to an effective confiscation;[33] rather, plaintiffs were allegedly deprived of the enjoyment of their concession only by the cooperative effect of a number of acts of state, of which Sharjah's

[33]Regardless of the wording of the complaint, it would be conceptually and prudentially hazardous to treat the territorial waters claims of Sharjah as a "confiscation," subject to adjudication under the international legal standards governing that kind of act. Claims to territory are a different matter from the expropriation of corporate property within or appertaining to that territory, *see* Latvian State Cargo & Passenger S.S. Line v. United States, 116 F.Supp. 717, 720, 126 Ct.Cl. 802 (1953). Moreover, territorial waters claims are subject to a body of international law wholly different from that relating to expropriations. *See generally* M. McDougal & W. Burke, The Public Order of the Oceans 486-98, 520-61 (1962).

claims were not the most efficacious. This is not a situation at which the Sabbatino Amendment was aimed.[34]

Plaintiffs next contend that Sharjah and Umm al Qaywayn do not qualify as "states" under the act of state doctrine, because they have delegated to Britain ultimate authority over their foreign relations. The authority cited by plaintiffs indicates a contrary result. In Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 293 F.Supp. 892 (S.D.N.Y.1967), aff'd, 433 F.2d 686 (2nd Cir. 1970), the act of state doctrine was held applicable to Wuerttemberg, one of the constituent states of West Germany. After citing cases that had accorded act of state treatment to similar national subdivisions,[35] the district court noted that Wuerttemberg "has had the power to engage in foreign relations with the consent of the Government of West Germany and has done so. See Article 32, West German Constitution * * *." 293 F.Supp. at 910; aff'd, 433 F.2d at 703. Under the holding of the *Zeiss* case and the authority on which it relied, the application of act of state to the Trucial States would appear to follow a fortiori. Previously recognized as independent sovereigns by Britain,[36] the Trucial States acceded super-

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[34]It is unnecessary to decide the proffered questions whether the Sabbatino Amendment does not apply to a taking of contractual rights, and whether the Amendment is intended only for cases in which confiscated property comes before the court. The second of these issues is currently being litigated in a setting demanding its resolution. *See* Banco Nacional de Cuba v. First National City Bank, 270 F.Supp. 1004 (S.D.N.Y.1967), rev'd, 431 F.2d 394 (2nd Cir. 1970), vacated, 400 U.S. 1019, 91 S.Ct. 581, 27 L.Ed.2d 630 (1971).

[35]Shapleigh v. Mier, 299 U.S. 468, 57 S.Ct. 261, 81 L.Ed. 355 (1937); Stark v. Howe Sound Co., Inc., 280 N.Y. 622, 20 N.E. 2d 1007 (1939).

[36]The Trucial States continue to be accorded sovereign immunity by the British courts. *See* Antoun v. Harrison & Sons,

(This footnote is continued on next page)

vision over their foreign relations to the latter only by a series of treaties. H. Albaharna, The Legal Status of the Arabian Gulf States 70-74 (1968). While the precise international status of these skeikdoms is at present unique and difficult to characterize, *see id.* ch. 8, their degree of international personality is obviously greater than that, say, of Wuerttemberg. Bearing in mind especially the foreign affairs roots of the act of state doctrine, the court concludes that the doctrine applies to Sharjah and Umm al Qaywayn.

Nor is this concluson disturbed, as regards Sharjah, by plaintiffs' assertion that some of the conduct of its Ruler was motivated by "his own personal gain and benefit." Compl. ¶ 22(c). Jimenez v. Aristeguieta, 311 F.2d 547 (5th Cir. 1962), relied on by plaintiffs, holds only that crimes committed by a chief of state outside or in violation of his official authority are not acts of state. *Id.* at 557-558. Contrariwise, the complaint clearly indicates that the Ruler of Sharjah acted at all times in his official capacity and on behalf of his state. In these circumstances, as the *Jimenez* case itself holds, the act of state doctrine applies. *Id.* at 557.

Conclusion

For the reasons elaborated above, the act of state doctrine precludes this court from further adjudication of the instant complaint. The Buttes defendants in their briefs have contended that this defect of the complaint is jurisdictional. But it is clear from Ricaud v. American Metal Co., 246 U.S. 304, 308, 38 S.Ct. 312, 62 L.Ed. 733 (1918), quoted with approval in *Sabbatino*, 376 U.S. at 418, 84 S.Ct. 923, that this is not so;

Ltd. (Q.B.1965), *quoted in* H. Albaharna, The Legal Status of the Arabian Gulf States 147-48 (1968).

rather, the questioning of sovereign acts by the complaint results in its failure to state a claim upon which relief may be granted. *American Banana, supra,* 166 F. at 267. When confronted with this discrepancy of grounds at oral argument, counsel for the Buttes defendants contended finally that the court should "in the exercise of its jurisdiction" dismiss the complaint. The Buttes motion is, in any event, denominated as one under Fed.R.Civ.P. 12(b) (6) as well as 12(b) (1). In these circumstances, any misconstruction, in the briefs, of the act of state doctrine's import does not foreclose proper disposition of the motion. *See* Mota v. Boyd, Weir & Sewell, Inc., 206 F.Supp. 306 (S.D. N.Y.1962); *cf.* Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 249-250, 71 S.Ct. 692, 95 L.Ed. 912 (1951).

The Buttes defendants' motion to dismiss will be granted for failure to state a claim upon which relief may be granted.

In accordance with the foregoing,

IT IS ORDERED that the motion of the Clayco Petroleum Corporation and Bruce J. Clayman to dismiss the action is granted.

IT IS FURTHER ORDERED that the motion of the Buttes Gas and Oil Company, John Boreta, and William H. Smith to dismiss the action is granted.

United States Court of Appeals for the Ninth Circuit.

Occidental Petroleum Corporation and Occidental of Umm Al Qaywayn, Inc., *Plaintiffs-Appellants,* vs. Buttes Gas & Oil Company, John Boreta, William H. Smith and E. David Philley, *Defendants-Appellees.* No. 71-1984.

[June 23, 1972]

Appeal from the United States District Court Central District of California.

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

PER CURIAM:

Appellants filed a private antitrust action against Buttes Gas & Oil Company, Clayco Petroleum Corporation and certain officers of Buttes and Clayco.

The district court dismissed the action as to Clayco and its officer, 331 F. Supp. 92 (1971) and no appeal has been brought from that dismissal.

Buttes urged five substantive grounds for dismissal. The district court, in an extensive and well-researched opinion, rejected all but one—the act of state doctrine. *Id.* Appellants now urge that the order dismissing the complaint should be reversed.

The dismissal was correct. We affirm for the reasons stated in the district court's opinion. *Id.* We need not consider whether dismissal would have been appropriate for any of the other reasons urged.

The judgment is affirmed.[1]

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[1]We note two cases which the Supreme Court has decided during the pendency of this appeal.

In *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508 (Jan. 13, 1972) the court held that a combination

Statutes Involved.

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any com-

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to harass and deter others from having free and unlimited access to agencies and the courts may constitute a violation of the antitrust laws. While the decision is pertinent to one of the other grounds for dismissal urged by Buttes, it has little bearing on the act of state doctrine.

First National City Bank v. Banco Nacional de Cuba, 40 LW 4653 (June 7, 1972), involved a suit arising out of the Cuban government's expropriation of American-owned property. While there is no majority opinion, five members held that the act of state doctrine did not apply under the circumstances of that case. The decision, nevertheless, is limited to the facts of that case and only one member would depart from the court's earlier pronouncements on the act of state doctrine. The decision does not affect the result in our case.

modity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (15 U.S.C. §1.)

* * *

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (15 U.S.C. §2.)

* * *

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be

by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. (15 U.S.C. §4.)

* * *

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. §15.)

* * *

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subpara-

graph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of the confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court. (22 U.S.C. §2370[e][2].)

SEP 12 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-244

OCCIDENTAL PETROLEUM CORPORATION, a California corporation and OCCIDENTAL OF UMM AL QAYWAYN INC., a California corporation, *Petitioners,*

v.

BUTTES GAS & OIL COMPANY, a corporation, JOHN BORETA and WILLIAM H. SMITH, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-244

OCCIDENTAL PETROLEUM CORPORATION, a California corporation and OCCIDENTAL OF UMM AL QAYWAYN INC., a California corporation, *Petitioners,*

v.

BUTTES GAS & OIL COMPANY, a corporation, JOHN BORETA and WILLIAM H. SMITH, *Respondents*

BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

The petition implies that the District Court's Opinion and Order decided that the act of state doctrine barred antitrust recovery "merely because conduct in furtherance of the conspiracy induced acts by foreign governmental officials which violated international law." (Petition, at 2). That question is not raised because the District Court dismissed for a different reason.

The questions which are presented are as follows:

1. Whether this Court should order the District Court to grant petitioners leave to amend their com-

plaint to allege that acts of the governments of Great Britain, Iran, Umm Al Qaywayn, and Sharjah were confiscations in violation of international law—allegations essential to a complaint under the Hickenlooper Amendment bringing into question the acts of foreign sovereigns—where petitioners were apprised by the District Court's Opinion and Order that their complaint was fatally defective in the absence of such allegations, and where petitioners failed to move in the District Court at any time for leave to amend, as they were entitled so to move under Rules 15, 59 and 60 of the Federal Rules of Civil Procedure.

2. Whether a private Sherman Act complaint was correctly dismissed for failure to state a claim of injury to business or property resulting from an antitrust violation, where the plaintiffs' right to recovery explicitly depended upon a determination of the reasons for acts of the sovereign states of Great Britain, Iran, Umm Al Qaywayn and Sharjah, and where none of the acts of these states was alleged to have been a confiscation or taking in violation of international law, and where there was no *res* before the court, as required by the Hickenlooper Amendment.

STATUTES AND RULES INVOLVED

The statutes involved are sections 1 and 2 of the Sherman Act (15 U.S.C. § § 1, 2); section 4 of the Clayton Act, 15 U.S.C. § 15; the Hickenlooper Amendment to the Foreign Assistance Act of 1964, 22 U.S.C. § 2370 (e)(2); and the 1965 Amendment to the Foreign Assistance Act of 1964; (Section 301(d)(2) of Public Law 89-171 (September 6, 1965) 79 Stat. 659 (1965)). The above are printed in the appendix to the Petition for Certiorari, with the exception of Section 301(d)(2)

of Public Law 89-171, 79 Stat. 659 (1965) and section 4 of the Clayton Act, which are printed in the appendix hereto. Also involved, and printed in the appendix hereto, are Rules 15(a); 19(a),(b); 59(e) and 60 (b) of the Federal Rules of Civil Procedure.

STATEMENT

The Petitioners (hereinafter referred to collectively as "Occidental") filed an action under the Sherman Act against the Respondents and others (hereinafter referred to collectively as "Buttes") seeking treble damages for claimed injury to business or property, and seeking injunctive relief. The complaint also named as defendants Clayco Petroleum Corporation and its president. The Clayco parties were dismissed on grounds of defective service, and lack of personal jurisdiction and venue. No appeal was taken from their dismissal.

Buttes and Occidental are American oil companies with subsidiaries operating in the Arabian Gulf. Occidental had reported gross revenues of over $2 billion, or about 275 times the $7.5 million gross revenues of Buttes, and Occidental had net income of about $175 million, or 134 times Buttes' net income of $1.3 million. [R. 83] *

The complaint, [R.1-22], alleged that Buttes engaged in a plan to control and eliminate competition by "preventing plaintiffs from acquiring and exploiting rights to petroleum reserves in the offshore area of the Trucial States." [Complaint, ¶ 21, R.8]

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* Reference to pages in the Clerk's Record in the District Court are preceded by "R.", except for pages of the Transcript of Oral Argument which are preceded by "R.Tr."

In November, 1969, Occidental entered into a concession agreement with the Trucial State of Umm Al Qaywayn by which Occidental was granted a right to exploit resources which might be discovered in lands under the Arabian Gulf adjacent to the coast of Umm Al Qaywayn, including the lands claimed by Umm Al Qaywayn as within its continental shelf. The concession area included submerged lands extending to within three miles of the coastline of the island of Abu Musa, which lies about 38 miles off the coast of Umm Al Qaywayn and Sharjah, which at all times mentioned in the Complaint, was a Trucial State adjacent to Umm Al Qaywayn.

In December, 1969, Buttes entered into a concession agreement with Sharjah by which Buttes obtained rights to explore for and exploit oil resources of the submerged lands of Sharjah. The island of Abu Musa is claimed by Sharjah, and is not claimed by Umm Al Qaywayn. In addition, Iran claims ownership of the island of Abu Musa and a twelve mile territorial sea belt surrounding it, the same limit asserted by her generally over her marginal seas. Under principles of international law, Sharjah claims a territorial sea of twelve miles from all its coastlines, including the coastline of Abu Musa. Sharjah's claim to this area is also based upon the doctrine of the continental shelf. *See,* Convention on the Continental Shelf, Art. I, II (Law of the Sea Convention No. IV, Ch. 2, 209-276 (1962).

In the course of its seismic explorations, Occidental discovered an area about nine miles from the coastline of Abu Musa which showed structures of the kind favorable to the existence of oil.

Thus an area thought to have promising potential for oil development lies within the claimed continental shelf

boundary of Umm Al Qaywayn, and the claimed territorial sea and continental shelf boundaries of Sharjah.

The complaint alleged that Occidental was denied opportunity to exploit the promising area, and that the denial resulted from Sherman Act violations by Buttes. The allegations made by Occidental to support it may be summarized as follows:

A. The complaint alleged that Buttes induced the Ruler of Sharjah to issue decrees setting forth Sharjah's claim to a twelve-mile territorial sea surrounding Abu Musa, and that the Ruler of Sharjah backdated one of these decrees. [R. 9]

B. The complaint alleged that the decrees constituted an attempt to appropriate Occidental's concession in violation of international law. [R. 9-11] However, there is no allegation of a confiscation by Great Britain, or by Iran, or by Umm Al Qaywayn, or by Sharjah, and there is no allegation that any of the acts of the states of Great Britain, Iran or Umm Al Qaywayn, violated international law.

C. The complaint alleged that the Ruler of Sharjah acted for personal gain and benefit, and was a co-conspirator of Buttes [R. 9, 236-37], and also claimed that Buttes arranged to have its attorney appointed as Legal Advisor to Ruler of Sharjah for the purpose of obtaining the decrees mentioned above. [R. 10]

D. The complaint alleged that in May, 1970 Buttes induced the National Iranian Oil Company to announce a claim to Abu Musa on behalf of Iran, by issuance of a letter to that effect. [R. 222-23].

The complaint did not allege that this was a confiscation, or that it violated international law.

E. The complaint alleged that Buttes had "induced and procured personnel of the British Foreign Office to request [of Occidental] that they not commence drilling operations". [R. 12]

F. The complaint alleged that Occidental's opportunity to exploit the disputed area was frustrated when, in June, 1970, a vessel of the British Royal Navy "menaced and threatened" Occidental's drilling equipment as it stood ready to commence drilling operations. The complaint further alleged that the home of the Ruler of Umm Qaywayn was "buzzed by airplanes of the British Royal Air Force and surrounded by British soldiers;" and that the Ruler of Umm Al Qaywayn directed Occidental not to drill. It further alleged that Occidental was "forced to abandon indefinitely their plans to commence drilling operations." [R. 12-13] The complaint did not allege that this application of force by the British government was induced or procured by Buttes.

The District Court dismissed the complaint on the ground that it would have required inquiry into the validity of acts of foreign states—an inquiry American Courts may not make because of the acts of state doctrine.

On appeal by Occidental, Buttes urged that correctness of the dismissal on act of state grounds, as well as upon four other grounds which were rejected by the District Court.

The Court of Appeals, by per curiam opinion, affirmed the dismissal for the reasons stated in the Dis-

trict Court opinion, deciding that it need not consider whether the dismissal would have been appropriate for any of the other reasons urged. In the opinion of Buttes, each of the other grounds would independently justify dismissal of the action. Briefly stated, they include the following:

(1) An essential element of a Sherman Act private action is injury to business or property resulting from the alleged violation, and Occidental could not show such causal connection without having the District Court determine the location of the disputed boundary between Sharjah and Umm Al Qaywayn—a determination which is beyond the competence of American courts.

(2) Even if the District Court had jurisdiction to adjudicate boundary disputes between foreign sovereigns, in such a determination, the sovereigns involved would be indispensable parties, and they are absent from the pending suit.

The District Court held that Occidental's claim did not invoke the Hickenlooper Amendment to the Foreign Assistance Act. The court held that an allegation of "attempted confiscation" does meet the requirements of the Hickenlooper Amendment that to avoid application of the act of state doctrine a claim must be based upon a "confiscation or other taking". The District Court also held that the Hickenlooper Amendment was not invoked by Occidental as to acts of Great Britain, Iran, or Umm Al Qaywayn, because there was no claim that any act of any of these sovereigns was a confiscation or was in violation of international law.

ARGUMENT

I. THE CASE DOES NOT RAISE THE QUESTION SOUGHT TO BE PRESENTED

The petitioners state the question presented as follows:

> Whether the act of state doctrine bars an antitrust action by an American company against other American companies and their officers, all private American citizens, for a conspiracy, formed and furthered in the United States, to preclude competition in foreign and interstate commerce on the United States merely because conduct in furtherance of the conspiracy induced acts by foreign governmental officials which violated international law.

The Respondents respectfully submit that this question is not before the Court.

1. The District Court Did Not Dismiss "Merely Because Conduct in Furtherance of the Conspiracy Induced Acts by Foreign Governmental Officials Which Violated International Law."

The District Court dismissal was based on a conclusion that in a private action under the antitrust laws, a causal connection between alleged violation and alleged harm is an essential element of the claim, and that where it appears from the face of the complaint that a causal connection cannot be substantiated except by determination of the reasons for the acts of foreign governments, no claim is stated. The District Court found that the complaint, taken as true, would require an impermissible inquiry into the reasons for acts of foreign governments. That decision left unaffected the doctrine of *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co.* v. *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), that trade-restraining conduct of private parties is not immunized

by the fact that they utilized, for private ends, advantages conferred by foreign government.

Moreover, irrespective of resolution of the act of state issue Occidental did not allege that Buttes induced, procured or caused the British Government to exercise military force against Occidental and Umm Al Qaywayn, and Occidental did not allege any reason except such show of force as the alleged cause preventing Occidental from drilling. Thus, Occidental failed to plead a claim against Buttes, and that flaw independently supports the District Court's dismissal, rendering it unnecessary to decide the question set forth in the petition for certiorari.

2. The Application of the Act of State Doctrine to Sovereign Acts of Great Britain, Iran and Umm Al Qaywayn Independently Supports Dismissal.

The allegation of "attempted confiscation" was directed only at acts of Sharjah, and not at acts of Great Britain, Iran or Umm Al Qaywayn, notwithstanding that an adjudication of the acts of these three other states, as the District Court found, "would form an integral part of plaintiffs' case." [R. 395; 331 F.Supp. at 112]

Thus whether the acts of Sharjah were or were not sovereign acts is irrelevant, because the resolution of that question would leave unaffected the decision that the complaint did not invoke the Hickenlooper Amendment as to the acts of the other three sovereigns.

3. The Application of the Hickenlooper Amendment to Acts of Sharjah Is Not Presented.

The District Court held that an alleged "attempted confiscation" by Sharjah was insufficient to invoke the Hickenlooper Amendment, which is restricted to "con-

fiscations or other takings" in violation of international law.

Occidental, in apparent recognition that its complaint did not invoke the Hickenlooper Amendment, suggests that the complaint should have been read "as alleging that all purported governmental acts culminated in a violation of international law." (Petition, at 16) The petition also asserts that "If, for pleading purposes, the Hickenlooper Amendment requires the allegation of a completed confiscation, Occidental should have been given leave to allege so by amendment." (p. 16)

Thus, the petition would have this Court refashion Occidental's complaint at this late stage, either by reading into it essential allegations clearly not within it, or by ordering the District Court to grant leave to amend. Neither course is warranted.

The complaint has already been reviewed by the District Court and the Court of Appeals, and the interpretation suggested in the petition is not a fair inference from what was actually pleaded. Occidental pleaded, at separate places in the complaint, that Sharjah's conduct was an "attempted confiscation" [Complaint, ¶ 22(d); R. 9-10], and that Sharjah "attempted to appropriate" Occidental's concession. [Complaint ¶ 22 (g); R. 11] In addition, Occidental stated in its complaint; and in its brief in the District Court, that the alleged acts of Sharjah were ineffective in influencing the British Foreign Office, and that, notwithstanding the alleged acts of Sharjah, the British Foreign Office informed Occidental it could proceed to drill. [Complaint, ¶ 22(h); R. 12; R. 221-222] Thus the suggestion that, somehow, Occidental had pleaded a confiscation by Sharjah is contradicted by what it actually did plead.

Moreover, Occidental did not move in the District Court to amend after the District Court's Opinion and Order was issued, as it could have moved under Rules 15(a), 59(e) and 60(b) of the Federal Rules of Civil Procedure. *See,* 3 Moore, Federal Practice, ¶¶ 15.07 [2], 15.10 (2d ed. 1970).

II. THE DECISIONS OF THE COURTS BELOW ON THE GROUNDS OF ACT OF STATE ARE CORRECT.

The decision of the District Court, affirmed per curiam by the Court of Appeals, correctly follows the language and prior judicial interpretations of the antitrust laws, as well as the amendments to the Foreign Assistance Act Amendments, and the prior judicial applications of the act of state doctrine.

1. The Acts of Foreign States Were Necessarily Called into Question by Occidental's Complaint

Occidental's complaint claimed injury to its business or property as a result of its having been prevented from exploiting the subsea resources hoped to be found in an area of the Arabian Gulf nine miles from the coastline of the island of Abu Musa.

According to the complaint, actions of the British and Umm Al Qaywayn governments deterred Occidental from drilling. Umm Al Qaywayn allegedly acted because it was threatened by British Armed force. The complaint does not allege why Great Britain so acted.

If Great Britain's conduct were caused by factors entirely separate from, and unrelated to attempted persuasion by Buttes, no one would suggest that Buttes should bear legal liability for such governmental conduct. Thus, critical to Occidental's claim would be a determination that the acts of Great Britain described in the complaint were caused by Buttes.

To reach such a conclusion the District Court would have had to sit in judgment on what factors influenced British foreign policy to apply military force in a politically complex and sensitive area of the world. It would have had to ascertain whether British policy was influenced at all, or to what degree, by the entreaties of a small American oil company, as opposed to whatever other considerations the British Government was weighing.

Similarly, the District Court would have had to determine what considerations influenced the Ruler of Umm Al Qaywayn to order Occidental not to drill; what considerations influenced Iran to claim Abu Musa, and what considerations influenced the Ruler of Sharjah to issue decrees and to enter into a concession agreement.

For a private plaintiff to be entitled to antitrust relief, he must allege not only that an antitrust violation has been committed and that he was injured. Also, he must allege that the "injury to his business or property" was caused by the antitrust violation. (15 U.S.C. § 15) The allegation of a causal link between the alleged violation and the damage to business or property is essential. *Flinkote Co.* v. *Lysfiord,* 246 F.2d 368, 392 (9th Cir.), *cert. denied,* 355 U.S. 835 (1957); *Glenn Coal Co.* v. *Dickinson Fuel Co.,* 72 F.2d 885, 887 (4th Cir. 1934). *See, also, Story Parchment Co.* v. *Paterson Parchment Co.,* 287 U.S. 555 (1931); *Hawaii* v. *Standard Oil Co.,* 405 U.S. 251 (1972).

Thus any antitrust claim accruing to Occidental would have necessarily turned on the results of a judicial inquiry into the reasons for the acts of foreign sovereigns.

2. The Act of State Doctrine Precludes Inquiry into the Acts of Foreign States

In *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 762-63 (1972) and in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 416 (1964), this Court referred to the "classic American statement" of the act of state doctrine found in *Underhill* v. *Hernandez,* 168 U.S. 250 (1887) where Chief Justice Fuller said for a unanimous Court (168 U.S. at 252):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

In *Sabbatino,* this Court also said, 376 U.S. at 416-17:

> None of this Court's subsequent cases in which the act of state doctrine was directly or peripherally involved manifest any retreat from Underhill. See American Banana Co. v United Fruit Co., 213 US 347, 53 L ed 826, 29 S Ct 511; Oetjen v Central Leather Co., 246 US 297, 62 L ed 726, 38 S Ct 309; Ricaud v American *Metal Co., 246 US 304, 62 L ed 733, 38 S Ct 312; Shapleigh v Mier, 299 US 468, 81 L ed 355, 57 S Ct 261, 113 ALR 253; United States v Belmont, 301 US 324, 81 L ed 1134, 57 S Ct 758; United States v Pink, 315 US 203, 86 L ed 796, 62 S Ct 552. On the contrary in two of these cases, Oetjen and Ricaud, the doctrine as announced in Underhill was reaffirmed in unequivocal terms.

The Court, 376 U.S. at 418, quoted the statement of the act of state rule in *Ricaud* v. *American Metal Co.*, 246 U.S. 304-309 (1968), as follows:

> It requires only that, when it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision.

The citation in *Sabbatino* of *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), is particularly pertinent because petitioners have attempted to distinguish *American Banana* by quoting from that part of the opinion dealing with the extent of extraterritorial reach of the Sherman Act; not that part dealing with act of state. Whether or not this Court has, as petitioner asserts, "rejected" *American Banana's* "restrictive view of the Sherman Act's territorial reach" (Petition, p. 9) is irrelevant, because the extraterritorial reach of the Sherman Act is not here at issue. *American Banana's* ruling on the act of state doctrine has not been rejected. Indeed, it was reaffirmed in *Ricaud*, 246 U.S. at 309; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 303 (1918) and *Sabbatino*, 376 U.S. at 398, 416-17. *See, also, United Mine Workers* v. *Pennington*, 381 U.S. 657, 671 (1965).

There is also no substance to Occidental's argument that *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927) and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) have undercut the act of state doctrine as described in *American Banana*.

In *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), a *world monopoly* on sisal was achieved by a series of private actions in the United States and Mexi-

co, some of which were aided by discriminatory Mexican legislation. This Court held that the course of conduct involved was illegal, carefully distinguishing it from *American Banana*, 274 U.S. at 276:

> The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.

Similarly, *Continental Ore* did not turn on an act of state issue. The defendants were accused of joint efforts to monopolize the vanadium market in the United States. ElectroMet of Canada, a subsidiary of one of the alleged conspirators, had been appointed by the Canadian Government as its exclusive vanadium purchasing agent during World War II. The plaintiff alleged that ElectroMet used its "discretionary powers" as purchasing agent in furtherance of a conspiracy to destroy plaintiff's business, by refusing to purchase from plaintiff.

This Court, in holding that the use of their discretionary authority did not shield the defendants' private conduct from the antitrust laws, made it abundantly clear that the plaintiff's cause of action did not require inquiry into the validity of acts of the Canadian Government (370 U.S. at 706): "In the present case petitioners do not question the validity of any action taken by the Canadian Government or by its Metals Controller."

Thus neither *Sisal* nor *Continental Ore* undercut the holding of *American Banana* that American courts will not inquire into the validity of the acts of a foreign state. That conclusion is also manifested in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) where the Court held that antitrust damages could not be recovered for injury suffered as a result of the acts of government. Among the cases cited for that conclusion was *American Banana,* 381 U.S. at 671.

There is, therefore, no basis for the argument that the act of state doctrine has been cast aside in antitrust cases. In such cases, as in others, American courts will not entertain actions the outcome of which would require determination of the reasons for, or the validity of, decisions taken by foreign sovereigns.

3. The Alleged Acts of Great Britain, Iran, Umm Al Qaywayn and Sharjah Are Sovereign Acts as to Which the Act of State Doctrine Applies

Petitioners do not dispute that the acts of Great Britain were sovereign acts. There is therefore no question but that the act of state doctrine precludes inquiry into the acts of Great Britain. This alone supports the judgment below.

With respect to Iran, the petition states (p. 66) that "the complaint alleged only a private commercial communication by an Iranian oil company, at Buttes' and Clayco's urging, that Iran claimed Abu Musa." The Petition fails to apprise this Court that during argument in the District Court, Occidental conceded that the National Iranian Oil Company expressed the claim of Iran to Abu Musa *on behalf of the Government of Iran.* [R.Tr. pp. 56-57.] For example, the District Court asked Occidental's counsel:

> "What is the basis of Iran's claim—that they just own the island?"

To which Occidental's counsel replied:

> They now claim they own the island, instead of the Shiek of Sharjah, and therefore they can go twelve miles instead of three miles.
>
> It has always been three miles, but this is a claim now for the first time not by these small shieks, *but by a government through the National Iranian Oil Company.* [R.Tr. 57, emphasis added]

This was only one of three separate acknowledgments by counsel for Occidental that the claim was on behalf of the Government of Iran. The District Court concluded that Occidental had conceded that the claim was made on behalf of Iran. [R. 409, 331 F.Supp. at 110 n.30]

Since Occidental's case would require inquiry into the reasons for, and validity of sovereign acts of Iran, the dismissal on act of state grounds was correct.

The District Court was also correct in holding that the complaint would require an impermissible inquiry into the acts of Sharjah or of Umm Al Qaywayn, also sovereign states. Sharjah and Umm Al Qaywayn, were, at all times mentioned in the complaint, Trucial States. The Trucial States have been recognized as sovereign by Great Britain, and accorded sovereignty in British courts. *Antoun* v. *Harrison & Sons, Ltd.,* The Times Law Report 15 (Vacation Ct. Queen's Bench Div. September 23, 1965). See, also, Al-Baharna, The Legal Status of the Arabian Gulf States, 147-48 (1968)

The act of state doctrine has been held applicable to Wuerttemberg, a constituent state of West Germany. *Carl Zeiss Stitfung* v. *VEB Carl Zeiss, Jena,* 293 F.Supp. 892 (S.D.N.Y. 1968), *aff'd,* 433 F.2d 686 (2d Cir. 1970).

Occidental's argument, invoking *Jimenez* v. *Aristeguieta*, 311 F.2d 547 (5th Cir. 1962), that the act of state doctrine does not apply because the Ruler of Sharjah allegedly was motivated by "his own personal gain and benefit", (Petition, p. 20) is wrong. The District Court concluded that the complaint "clearly indicates that the Ruler of Sharjah acted at all times in his official capacity and on behalf of his state." [R. 397; 331 F.Supp. at 113] The acts complained of in *Jimenez* were not acts of a sovereign, but were a man's crimes against the law of his own country.

Occidental is also wrong in asserting that the Trucial States are denied the benefit of the act of state doctrine because Great Britain exercised supervision over their foreign affairs. The Trucial States are recognized as sovereigns in British courts. *Antoun* v. *Harrison & Sons, Ltd.*, The Times Law Report 15 (Vacation Ct. Queen's Bench Div. September 23, 1965). Their relations with Great Britain are by treaty, itself an expression of their sovereignty. Moreover, the vesting by one government of authority in another government to conduct its foreign relations does not defeat a claim of sovereignty. *Sullivan* v. *State of Sao Paulo*, 36 F.Supp. 503 (E.D.N.Y.), *aff'd*, 122 F.2d 355, 359 (2d Cir. 1941).

Thus, even if the complaint turned solely on acts of Sharjah and Umm Al Qaywayn—which it did not—the District Court was correct in holding that the act of state doctrine precluded inquiry into the acts of Sharjah and Umm Al Qaywayn alleged in the complaint.

4. The Hickenlooper Amendment Does Not Permit Inquiry into the Acts of States Called into Question by the Complaint in this Case

The Hickenlooper Amendment to the Foreign Assistance Act of 1964 (sometimes called the "Sabbatino" amendment), 22 U.S.C. § 2370(e)(2), is a careful Congressional declaration of a limited exception to the act of state doctrine. The amendment reads as follows:

> Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation and the other standards set out in this subsection: *Provided,* That this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law or with respect to a claim of title or other right to property acquired pursuant to an irrevocable letter of credit of not more than 180 days duration issued in good faith prior to the time of confiscation or other taking, or (2) in any case with respect to which the President determines that application of the act of state doctrine is required in that particular case by the foreign policy interests of the United States and a suggestion to this effect is filed on his behalf in that case with the court.

That amendment was designed to overturn in part *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), which held that the courts of the United States

would not make inquiry into the validity under Cuban law of acts of expropriation by the Castro government.

The District Court correctly decided that the Hickenlooper Amendment did not apply to this case.

A. The Complaint Is Not Based Upon a Confiscation or Other Taking.

The first predicate for operation of the Hickenlooper Amendment is a claim of confiscation or other taking of property. The complaint in this case made no claim of confiscation or other taking by Great Britain, Iran, Umm Al Qaywayn or Sharjah. For that reason alone, the Hickenlooper Amendment was properly held not to apply to the complaint.

With respect to Sharjah, the complaint asserted only that the acts of Sharjah constituted "in effect an attempted confiscation, without compensation, of plaintiffs' vested property rights in the oil and gas to which they were entitled . . .". [Complaint ¶ 22(d), R. 9-10] The District Court held that this allegation did not allege a confiscation or taking as required by the Hickenlooper Amendment.

In an effort to avoid this deficiency in its pleading, Occidental made a mistake respecting the legislative history of the Hickenlooper Amendment, by citing as evidence of Congressional intent, the wrong Congressional committee report. Occidental cites a Senate Committee Report on the original Hickenlooper proposal which was discarded by the Congress in favor of a precisely limited exception to the act of state doctrine. Thus, Occidental (Petition, p. 11) quotes from Senate Report No. 1188, 88th Cong., 2d Sess. (1964) in an attempt to create an impression that the Hickenlooper Amendment was intended to work a wholesale reversal of the act of state doctrine, as applied in *Sabbatino,* by

establishing a presumption that an adjudication on the merits would not embarrass the Executive in the conduct of foreign policy. This report, Senate Report No. 1188, was directed to the original language of the Hickenlooper proposal, as it was adopted in the Senate Committee and as it was approved in the Senate, as an amendment to a House bill, (H. R. 11380, 88th Cong., 2d Sess. 1964). In the subsequent Committee on Conference of the two houses the Hickenlooper proposal was rewritten to change entirely its original concept, and to create a limited exception to the act of state doctrine, applying solely to cases where a claim of title or other rights is asserted, based upon a confiscation or other taking by a foreign government in violation of international law. The "reversal of presumption" contemplated in the original Hickenlooper proposal was abandoned. The Conference Committee language was substituted for the language in the original Senate bill, and was enacted into law. H.R. Rep. No. 1925, Conference Report to accompany H.R. 11380, The Foreign Assistance Act of 1964, 88th Cong., 2d Sess., 3-4, 16 (1964).

In *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 60, 295 N.Y.S.2d 433, 447 (1967) the court emphasized the carefully limited scope of the 1964 amendment:

> Further proof of the limited scope intended for the exemption from the act of state doctrine is found in the *Senate's refusal to enact Senator Hickenlooper's original, broadly worded, draft of the amendment which would have made the act of state doctrine inapplicable to* any *case 'in which an act of a foreign state occurring after January 1, 1959 is alleged to be contrary to international law.' The statute, as actually adopted in 1964, contained the far more restrictive wording which we have already discussed.* [23 N.Y.2d at 60-6, 295 N.Y.S.2d at 447. Emphasis added]

The court also stated (23 N.Y.2d at 60, 295 N.Y.S.2d at 447):

> The words 'confiscation' and 'taking,' the debates and committee hearings established, were used synonymously with 'expropriation' and 'nationalization.' (See, e.g., Hearings Before Senate Committee on Foreign Relations on S. Bill 2659, 2660, 2662, 88th Cong., 2d Sess. [1964], p. 619; S. Rep. No. 1188, Pt. I, 88th Cong., 2d Sess. [1964], p. 24; 110 Cong. Rec. 19548, 19557-19559, 23680, 24076-24077.)

Senate Report No. 1188, cited by Occidental, therefore offers no aid in interpreting the language of the Hickenlooper Amendment as finally enacted.

It should also be noted that the assertion of a subsea boundary claim cannot be considered a taking or confiscation. Umm Al Qaywayn and Sharjah each claim title to the area which is in dispute. They are simply involved in a controversy over boundary.

Occidental cites no cases suggesting that a state takes or confiscates property by publishing declarations as to where it asserts its boundaries are located. Common sense dictates that such declarations should not be considered takings or confiscations. The assertion of claims is the proper way to make differences known, so that they may be resolved by diplomacy, treaty, arbitration, or World Court adjudication. *See, e.g.,* the resolution of claims to certain portions of the North Sea continental shelf, *Germany-Denmark-Netherlands North Sea Continental Shelf Cases* [1969] I.C.J. 3; and the resolution of Norway's claim of the right to use straight baselines for measuring the breadth of its territorial sea, *United Kingdom-Norway Fisheries Case,* [1951] I.C.J. 116.

It is apparent, therefore, that the complaint made no claim of confiscation or taking, and the Hickenlooper Amendment is not applicable to this case.

In an effort to overcome this flaw, the petition asserts that the complaint should have been read as alleging that "all the purported governmental acts culminated in a violation of international law," and that the ultimate effect of the ousting of Occidental from its concession was an "internationally unlawful confiscation without compensation." (Petition, 16) Occidental asserts that it should have been granted leave to so allege.

This defect cannot be so easily cured. Occidental made explicit in its complaint, and in its brief in the District Court, that the alleged acts of Sharjah were ineffective in influencing the British Foreign Office, and that in the face of such alleged acts of Sharjah, the British Foreign Office informed Occidental it could proceed to drill [R. 12, 221-222.] The suggestion that Occidental claimed Sharjah's acts constituted a confiscation is not only a belated afterthought, but is squarely inconsistent with Occidental's pleading and argument presented below.

In short, Occidental asserted no claim based on a taking or confiscation which would call into operation the Hickenlooper Amendment's exception to the act of state doctrine.

B. The Complaint Is Not Based Upon a Confiscation or Other Taking in Violation of International Law.

A second predicate of the Hickenlooper Amendment is that the alleged taking or confiscation be an act of state "in violation of the principles of international law. . . ."

While the complaint made a conclusory assertion that Sharjah violated international law, the allegedly unlawful acts do not constitute even a colorable allegation of violation of international law. The petition suggests no case holding that it is a violation of international law for a nation to announce a boundary claim; to enter into a concession agreement; to appoint a legal advisor; or to urge the merits of its claim on other nations.

With respect to the acts of Great Britain, Iran and Umm Al Qaywayn, no claim is made that any of their acts violated international law. Thus the second predicate of the Hickenlooper Amendment is not met as to any of these three states, and the act of state doctrine precludes inquiry into the validity and effect of their acts. *F. Palicio y Compania, S.A.* v. *Brush,* 256 F.Supp. 481, 487 (S.D.N.Y. 1966); *Present* v. *U.S. Life Insurance Co.,* 96 N.J. Super 285, 232 A.2d 863, 872 (1967), *aff'd per curiam,* 51 N.J. 407, 241 A.2d 237 (1968). Since the complaint herein is not based on confiscation or taking in violation of international law, the Hickenlooper Amendment does not apply.

C. The Hickenlooper Amendment Does Not Apply to the Alleged Confiscation or Taking of Contract Rights.

The complaint is based on an alleged interference with contractual rights rather than on a taking of property. Occidental's complaint, Paragraph 12 [R. 4], described the concession as an "agreement wherein and whereby, for good and valuable consideration, Umm Al Qaywayn granted Occidental . . . the exclusive right . . . to explore, search, drill for, produce, extract and sell as its own, oil and gas from the seabed and subsoil underlying the territorial and offshore waters of Umm Al Qaywayn. . . ."

The Hickenlooper Amendment is not applicable to contract claims, but only to claims to property. By Section 301(d)(2) of Public Law 89-171 (September 6, 1965) Congress revised the 1964 Hickenlooper Amendment by inserting the words "to property" in two sections, in order to clarify the word "right" as used in the 1964 Hickenlooper Amendment. 79 Stat. 659 (1965). Thus, the statute was changed to require "a claim of title or other right *to property.*" (Emphasis added.) This was intended to make explicit the fact that all contract claims were excluded from the operation of the Hickenlooper Amendment.

With respect to the 1965 modification, *French* v. *Banco Nacional de Cuba,* 23 N.Y.2d 46, 61-62, 295 N.Y.S.2d 433 (1968) stated:

> . . . Congress decided to eliminate *all* contract claims from the statute rather than attempt the more subtle task of distinguishing between contract cases in which the act of state defense might be asserted and those in which it might not. Judge Keating may disapprove of Congress' choice of a method for accomplishing its purpose, but that choice—by the plain evidence of the 1965 amendment and of the accompanying Senate Report—is the one that was made, and it is binding upon us.

The *French* case therefore squarely sets forth that the Hickenlooper Amendment is not a judicial warrant to inquire into alleged confiscations of contractual rights by acts of states.

D. There is No Res Before the United States Courts Over Which Jurisdiction Can Be Exercised

The subject matter of the alleged "attempted confiscation"—oil resources thought to exist in the disputed area in the Arabian Gulf—is not within the

jurisdiction or control of the courts of the United States. The legislative history of the Hickenlooper Amendment discloses that it applies only to confiscated property before a United States court. Senator Hickenlooper stated, 110 Cong. Rec. 19557 (1964):

> The amendment is designed to discourage uncompensated appropriation of foreign investment by preserving the right of the original owners to attack any taking in violation of international law *if the property involved comes before a U.S. court.* (Emphasis added.)

In explaining the amendment to the House of Representatives upon its consideration of the Conference Report, Congressman Adair stated:

> It insures that however the case may arise or the act of state doctrine be invoked, a party who had suffered an expropriation in violation [of the principles of international law] *may bring suit to assert his claim to the expropriated property if there is an attempt to market it in the United States* or can resist a suit by the expropriating government to seize the property. (110 Cong. Rec. 23680 (1964)) (Emphasis added.)

Thus, the intent of Congress was that the confiscated *res* must come before the United States court before the Hickenlooper Amendment would apply.

III. THE DECISION BELOW IS INDEPENDENTLY SUPPORTED ON OTHER GROUNDS REJECTED BY THE DISTRICT COURT AND NOT REACHED BY THE COURT OF APPEALS.

1. The Complaint Was Correctly Dismissed Because the Lack of Jurisdiction to Fix the Boundaries of Foreign Nations Precludes Proof of Injury Cognizable under the Antitrust Laws.

The courts of the United States lack jurisdiction to adjudicate boundary disputes between nations. In *De La Croix* v. *Chamberlain,* 25 U.S. (12 Wheat.) 599, 600 (1827), the Court stated:

> A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation.

To the same effect are *Foster* v. *Neilson,* 27 U.S. (2 Pet.) 253, 304 (1829); *Garcia* v. *Lee,* 37 U.S. (12 Pet.) 511, 516-17 (1838); *Williams* v. *Suffolk Ins. Co.,* 38 U.S. (13 Pet.) 415 (1839).

The District Court correctly decided that it lacked jurisdiction to fix the boundary between the states of Sharjah and Umm Al Qaywayn. [R. 383, 331 F.Supp. at 103]

Notwithstanding that ruling, the District Court held that the resolution of the antitrust complaint before it did not require an explicit or implicit adjudication of the boundary dispute. The District Court characterized Occidental's theory as that of a conspiracy under the antitrust laws in the "clouding of the boundary question." [R. 383, 331 F.Supp. at 104] The District Court erred in assuming that the boundary dispute would not, of itself, prevent an adjudication of the antitrust question.

For a private plaintiff to be entitled to antitrust relief, he must allege that he has been caused injury to his business or property by an antitrust violation. See cases cited *supra,* at 12.

Occidental claimed injury to its business and property in that it was denied the potential oil resources in a concession area granted to it by Umm Al Qaywayn, which is claimed by Sharjah and by Iran.

If the disputed area is not within Umm Al Qaywayn's boundaries, Occidental will have been deprived of none of the oil resources in that area because it will have been entitled to none. As an indispensable element of its case, therefore, Occidental would have to prove that it had a right to the oil resources in the disputed area. Occidental cannot make that proof without establishing that the disputed area is within the boundaries of Umm Al Qaywayn. But Occidental cannot offer evidence on that question simply because the District Court cannot decide where the boundaries of Umm Al Qaywayn are.

It is apparent that Occidental can state no claim for injury upon which it can recover, because its injury, if any, is legally incapable of ascertainment. *See, Keogh* v. *Chicago & N.W. Ry.,* 260 U.S. 156 (1922); *Okefenokee Rural Elec. Membership Corp.* v. *Florida P. & L. Co.,* 214 F.2d 413 (5th Cir. 1954); cited approvingly in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965).

In conclusion, Occidental's antitrust claim requires a showing of its entitlement to occupancy and use of the disputed area. That showing cannot be made because the court cannot adjudicate the location of the disputed boundary. Occidental's complaint therefore was correctly dismissed.

2. The Complaint Was Correctly Dismissed Because of the Absence of Sharjah, Umm Al Qaywayn and Iran Which Are Indispensable Parties.

Rule 19 of the Federal Rules of Civil Procedure sets forth criteria for determining when, in the absence of a party (Fed. R. Civ. P. 19(a)) "in equity and good conscience the action should proceed among the parties before it. . . ." (Fed. R. Civ. P. 19(b)). The criteria are based upon the principle of *Shields* v. *Barrow,* 58 U.S. (17 How.) 130 (1855) that "a circuit court can make no decree . . . between the parties before it, which so far involves or depends upon the rights of an absent person" without the joinder of that person.

Sharjah, Umm Al Qaywayn and Iran are indispensable parties because the territorial sovereign rights of one or more of them would be materially prejudiced by outcome of the litigation. This is a case where two concessionaires, *i.e.,* two lessees, are in dispute over the validity of title derived from their respective grantors-lessors. Two of the three principal parties in interest are the grantors—Sharjah and Umm Al Qaywayn—and none is a party to the action.

The applicable rule is stated by Moore as follows:

> Where the result of the suit is dependent upon the validity of the right or title of an absent person, as a suit for an injunction against one who is acting under the charter of another, or a suit between lessees of different persons for the same property . . . the absent party is indispensable.

3A Moore, Federal Practice ¶ 19.12, at 2371 (2d ed. 1970); *McConnell* v. *Dennis,* 153 F. 547, 549 (8th Cir. 1907); *South Penn Oil Co.* v. *Miller,* 175 F. 729, 736-37 (4th Cir. 1909); *Lawrence* v. *Sun Oil Co.,* 166 F.2d 466, 469-70 (5th Cir. 1948).

Since the instant case would require determination of sovereignty interests of Sharjah, Umm Al Qaywayn and Iran, they are indispensable parties, and their absence required dismissal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: September 12, 1972
Washington, D. C.

APPENDIX

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SEC. 301. Chapter 1 of part III of the Foreign Assistance Act of 1961, as amended, which relates to general provisions, is amended as follows:

* * *

(d) Amend section 620, which relates to prohibitions against furnishing assistance to Cuba and certain other countries, as follows:

* * *

(2) Amend subsection (e)(2), which relates to the act of state doctrine, by inserting after the words "other right" each time they appear the words "to property", and by striking out ", or (3) in any case in which the proceedings are commenced after January 1, 1966".

CLAYTON ACT, Section 4; 15 U.S.C. § 15

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found, or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Federal Rules of Civil Procedure

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(a) *Amendments.* A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not

been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) *Persons to be Joined if Feasible.* A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) *Determination by Court Whenever Joinder not Feasible.* If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be

dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

RULE 59. NEW TRIALS; AMENDMENT OF JUDGMENTS

* * *

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

* * *

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year

after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.